(1) 91-1231

Supreme Court, U.S.
FILED
JAN 29 1992
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

ALVIN J. DIXON

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL FOSTER

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars prosecution of a defendant on substantive criminal charges based upon the same conduct for which he previously has been held in criminal contempt of court.

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgments of the District of Columbia Court of Appeals in these cases.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 598 A.2d 724. The opinions of the Superior Court of the District of Columbia in *Foster* (App., *infra*, 21a-24a) and *Dixon* (App., *infra*, 25a-57a) are not yet reported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 58a-59a) was entered on October 31, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT

In each of these cases, the defendant violated a court order prohibiting him from engaging in certain conduct. In each case, the defendant was held in criminal contempt for violating the order and was sentenced to a term of imprisonment. The defendant in each case was also indicted on criminal charges arising from the same conduct for which he was held in contempt. The court of appeals dismissed the indictments, holding that criminal contempt proceedings, followed by prosecution for the same conduct, placed each defendant twice in jeopardy for the same offense, in violation of the Double Jeopardy Clause.

1. *Foster.* On July 29, 1987, Foster's estranged wife, Ana, filed a petition in Superior Court of the District of Columbia for a temporary protection order pursuant to D.C. Code Ann. § 16-1004(d) (1981). In support of her petition, she alleged that Foster had abused her repeatedly. App., *infra,* 22a. On August 12, 1987, Foster consented to the entry of a one-year civil protection order (CPO) under D.C. Code Ann. § 16-1005 (1981). The court accordingly entered an order stating that Foster must not "molest, assault, or in any manner threaten or physically abuse" his estranged wife. App., *infra,* 4a; Gov't C.A. Br. 2. The court also entered an order the same day forbidding Foster from engaging in any similar conduct toward his mother-in-law and ordering Foster to stay away from his mother-in-law's home and place of work. App., *infra,* 4a.

Within a short time, Foster began violating the orders. On September 22 and November 19, 1987, and on May 24, 1988, Ana Foster filed motions seeking to have Foster held in contempt for 16 alleged violations of the CPO. App., *infra,* 4a-5a. Foster's mother-in-law also filed a motion seeking to have Foster held in contempt, alleging six violations of the CPO that prohibited Foster from threatening her. App., *infra,* 5a. Among the allegations in the motions was that on November 6, 1987, Foster "grabbed [his wife] and threw her against a parked car," that on November 12, 1987, Foster "called [his wife] at home and threatened her," that on March 26, 1988, Foster "called threatening [his wife]," and that on May 17 he "called * * * threatening to kill [his wife]." The most serious allegation was that on May 21 he "threw [his wife] down basement stairs, kicking her body," and "pushed her head into the floor causing head injuries" which resulted in her losing consciousness. App., *infra,* 4a-5a.

The court heard evidence concerning the contempt charges at a three-day bench trial held on August 8-10, 1988. During the trial, eight witnesses testified. Ana Foster's counsel prosecuted the contempt. The United States did not participate in the trial. App., *infra,* 5a & n.8. Foster was found guilty of four counts of criminal contempt, including the two counts based on the November 6, 1987, and May 21, 1988, assaults on his wife.[1] He was found not guilty of the remaining contempt charges, including those based on the November 12, 1987, and March 26 and May 17, 1988, threats. App., *infra,* 6a-7a. He was sentenced to consecutive 150-day

[1] The other two counts were based on threats made by Foster against his wife on November 17, 1987, and a November 4, 1987, violation of the stay-away order relating to his mother-in-law. App., *infra,* 7a n.10.

prison terms on each of the four counts. See App., *infra,* 2a.[2]

Meanwhile, on July 21, 1988 (approximately two weeks before the contempt trial), the United States Attorney's office filed a complaint charging Foster with a single count of assault with intent to kill while armed, based on Foster's May 21, 1988, assault on his wife. On January 19, 1989, five months after the contempt trial, the grand jury returned a five-count indictment against Foster. Count 1 charged Foster with simple assault on November 6, 1987, in violation of D.C. Code Ann. § 22-504 (1981). Counts 2, 3, and 4, charged Foster with threatening to injure a person on November 12, 1987, and March 26 and May 17, 1988, in violation of Section 22-2307. Count 5 charged Foster with assault with intent to kill on May 21, 1988, in violation of Section 22-501. Counts 1 and 5 were based on the incidents for which Foster had been found guilty of criminal contempt; Counts 2, 3, and 4 were based on incidents for which Foster had been found not guilty of contempt after the criminal contempt trial. App., *infra,* 7a-8a, 22a.

Foster moved to dismiss the indictment on double jeopardy and collateral estoppel grounds. The trial court denied the motion, holding that criminal contempt is not the same offense as a substantive criminal charge based on the same conduct. App., *infra,* 23a. In addition, the trial court relied on D.C. Code Ann. § 16-1002(c) (1981), which provides that "[t]he institution of criminal charges by the United States Attorney shall be in addition to, and

[2] The Superior Court's order in Foster's subsequent criminal proceeding erroneously stated that Foster was sentenced "to one-hundred fifty (150) days on each of the *three* counts of contempt, sentences to be served consecutive to one another." App., *infra,* 22a (emphasis added).

shall not affect the rights of the complainant to seek any other relief under [the chapter regarding civil protection orders]." According to the court, that provision "clearly" demonstrates "an intent by the legislature to allow two different remedies for a violation of Civil Protection Orders," with the contempt prosecution "to protect the [party who obtained the order] and the ability of the Court to enforce its orders" while the substantive criminal prosecution was designed "to protect the community." App., *infra,* 23a-24a. The court did not rule on Foster's collateral estoppel arguments.

2. *Dixon.* On March 9, 1987, Dixon was arrested on a charge of second-degree murder while armed. The District of Columbia bail law provides that when an individual is released on bail, the judicial officer may impose any condition on the individual that "will reasonably assure the appearance of the person for trial or the safety of any other person or the community." D.C. Code Ann. § 23-1321(a) (1981). The judicial officer is directed to "issue an appropriate order containing a statement of the conditions imposed, if any, [and] shall inform such person of the penalties applicable to violations of the conditions of his release." § 23-1321(d). The bail law further provides that a person who has been released on bail and who has violated a condition of his release "shall be subject to revocation of release, an order of detention, and prosecution for contempt of court." § 23-1329(a).

Dixon was released on a $1500 surety bond. The printed release form stated that:

> You are hereby released on the conditions indicated below: These conditions will be in effect until your case is disposed of or until they are changed or amended by a judge. * * * You are to refrain from committing any criminal offense, the penalties for which are explained on the reverse side of this Order.

App., *infra,* 26a. On the reverse side, the order stated that "[y]ou are not to commit any criminal offense," and that "[a]ny violation of these conditions shall subject you to revocation of release, an order of detention, and prosecution for contempt of court." *Ibid.*

On January 15, 1988, while awaiting trial on the murder charge, Dixon was arrested for possession of cocaine with intent to distribute it, in violation of D.C. Code Ann. § 33-541(a)(1) (1981). On January 21, he was indicted for that offense. The government filed a motion to modify the terms of Dixon's release on the murder charge, and the Superior Court judge ordered Dixon to "show cause why he should not be held in contempt of court or have the conditions of his pretrial release modified." App., *infra,* 9a-10a. A two-day hearing was held on the show cause order. An Assistant United States Attorney examined witnesses concerning the cocaine charges, and the witnesses were cross-examined by Dixon's counsel. Each side then presented closing arguments. At the conclusion of the hearing, the court concluded "that the government ha[d] established beyond a reasonable doubt that [Dixon] was in possession of drugs and that those drugs were possessed with the intent to distribute them." App., *infra,* 10a-11a. Accordingly, the court found Dixon guilty of criminal contempt under Section 23-1329(c)[3] and sentenced him to 180 days in jail. App., *infra,* 11a.

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[3] D.C. Code Ann. § 23-1329 (1981) provides in pertinent part:

> (a) A person who has been conditionally released pursuant to section 23-1321 and who has violated a condition of release shall be subject to revocation of release, an order of detention, and prosecution for contempt of court.
>
> * * * * *
>
> (c) Contempt sanctions may be imposed if, upon a hearing and in accordance with principles applicable to proceedings for criminal contempt, it is established that such person has intentionally violated a condition of his release. Such contempt proceedings shall be expedited and heard by the court without a jury. Any person found guilty of criminal contempt for violation of a condition of release shall be imprisoned for not more than six months, or fined not more than $1,000, or both.

Dixon thereafter moved to dismiss the cocaine indictment on double jeopardy grounds. The trial court granted the motion, App., *infra,* 57a, rejecting the government's arguments that contempt of court and possession of cocaine with intent to distribute it are different offenses for purposes of the Double Jeopardy Clause. See App., *infra,* 31a, 33a-35a. The court recognized that "its decision may pose some difficult questions regarding the interaction of judges and prosecutors in initiating criminal proceedings," App., *infra,* 56a, because a judge's decision to go forward with criminal contempt proceedings "would preclude the defendant from being tried for the underlying offense." *Ibid.*

3. The defendant in *Foster* took an interlocutory appeal from the trial court's denial of his motion to dismiss his indictment, and the government appealed from the dismissal of the indictment in *Dixon.* After each case was separately briefed and argued, the District of Columbia Court of Appeals consolidated the two cases, reheard them *en banc,* and ruled that both prosecutions were barred by the Double Jeopardy Clause. App., *infra,* 1a-20a.

The court of appeals concluded that this Court's decision in *Grady* v. *Corbin,* 495 U.S. 508 (1990), "control[led]" these cases and "greatly simplified the issues." App., *infra,* 13a-14a. The court explained that because the conduct on which the contempt proceedings were based was the same conduct for which the government subsequently sought to prosecute the defendants, the Double

Jeopardy Clause, as interpreted in *Grady* v. *Corbin*, barred the government from proceeding with the criminal charges. App., *infra*, 15a-16a.

Even though contempt proceedings are often initiated and prosecuted by a court or a private party, whereas a substantive criminal prosecution is initiated and prosecuted by the executive branch, the court of appeals held that the Double Jeopardy Clause was applicable to successive contempt and criminal proceedings. The court observed that criminal contempt "is a crime in the ordinary sense," App., *infra*, 18a (quoting *Bloom* v. *Illinois*, 391 U.S. 194, 201 (1968)), and that "the impact of a contempt prosecution on any defendant * * * would be the same regardless of whether the contempt adjudication is sought by the government or a private party." App., *infra*, 19a. Accordingly, the court expressly stated its disagreement with *Ex parte Williams*, 799 S.W.2d 304 (Tex. Crim. App. 1990) (en banc), in which the Texas Court of Criminal Appeals relied on the difference in the identity of the prosecuting party to conclude that a contempt prosecution does not bar a later prosecution for a substantive criminal violation. App., *infra*, 19a.[4]

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[4] On January 17, 1992, the trial court, on remand in *Foster*, dismissed the indictment over the government's objection. We have moved for reconsideration of the order dismissing the indictment, on the ground that the government intends to file a petition for a writ of certiorari in the *Foster* case. That motion is currently pending. Accordingly, there remains a live controversy between the parties. In any event, a lower court may not in effect preclude this Court from reviewing a lower court decision by dismissing the case before a timely petition for certiorari is filed or acted on by this Court. Therefore, even if the Superior Court does not reinstate the indictment, this Court will not lose jurisdiction in the *Foster* case. Cf. *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983).

REASONS FOR GRANTING THE PETITION

Prior to this Court's decision in *Grady* v. *Corbin*, the prevailing view, embodied in decisions of this Court, the lower federal courts, and the state courts, was that criminal contempt proceedings do not bar prosecution of the same defendant for substantive criminal offenses based on the same acts. The District of Columbia Court of Appeals has held that *Grady* in effect overturned all of the considerable authority approving separate prosecutions for contempt and substantive criminal violations. The court of appeals' decision is thus in conflict with numerous pre-*Grady* decisions as well as several cases decided after *Grady*. If correct, the court of appeals' ruling would threaten the ability of state and federal courts to enforce compliance with their orders through the contempt sanction and the ability of prosecuting authorities to carry out their function in any case in which a single act violates both a court order and a criminal prohibition. In our view, the court of appeals' decision disregards settled principles of double jeopardy law that this Court did not intend to alter in *Grady*. Further review is therefore warranted.

1. Almost a century ago, this Court expressed the view that a conviction for criminal contempt does not bar a subsequent prosecution for a substantive criminal offense. In *In re Debs*, 158 U.S. 564 (1895), the defendants were held in summary criminal contempt for violating an injunction. Upholding the judicial power to punish contempt summarily, the Court stated that if a criminal prosecution should be brought against the defendants for the same conduct, "it will be no defence to such prosecution that they have disobeyed the orders of injunction served upon them and have been punished for such disobedience." 158 U.S. at 594; see also *id.* at 599-600 ("the penalty for violation of injunction is no substitute for and no

defence to a prosecution for any criminal offences committed in the course of such violation"); *Bessette* v. *W.B. Conkey Co.*, 194 U.S. 324, 330 (1904) (quoting above language).[5]

Two years later, the Court reiterated the same principle in a case involving Congress's contempt power. In *In re Chapman*, 166 U.S. 661 (1897), the defendant was indicted for refusing to answer questions put to him by a congressional committee. The defendant argued that, since Congress itself had the power to punish the same conduct as contempt, the statute impermissibly subjected witnesses to be twice put in jeopardy for the same offense. The Court rejected that argument, observing that "indictable statutory offences may be punished as such, while the offenders may likewise be subjected to punishment for the same acts as contempts, the two being *diverso intuitu* and capable of standing together." 166 U.S. at 672. Accord *Jurney* v. *MacCracken*, 294 U.S. 125, 151-152 (1935).[6]

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[5] In *Bloom* v. *Illinois*, 391 U.S. 194 (1968), the Court rejected the holding in *Debs* that courts have inherent power to punish serious contempts summarily. *Bloom* did not, however, disavow the statement in *Debs* that the same conduct could give rise to successive prosecutions for criminal contempt and a substantive criminal offense.

[6] Neither *Colombo* v. *New York*, 405 U.S. 9 (1972) (per curiam), nor *Menna* v. *New York*, 423 U.S. 61 (1975) (per curiam), are to the contrary. In *Colombo*, the defendant was first found guilty of criminal contempt for refusing to testify before a grand jury and then indicted under another criminal contempt provision of the state criminal code. This Court remanded for a determination whether the indictment was for the same refusal to testify. *Menna* apparently involved a similar fact pattern, and the case was similarly remanded to the New York Court of Appeals for "a determination of petitioner's double jeopardy claim on the merits," on which this Court "express[ed] no view." 423 U.S. at 63. The point made by this Court in *Debs* and *Chapman*—and in dispute here—is that a prosecution for criminal contempt does not bar a separate prosecution for a substantive criminal offense. Neither *Debs* nor *Chapman* discussed the issue in *Colombo* and *Menna*—whether a prosecution for criminal contempt would bar another prosecution for criminal contempt based on the same conduct by the defendant.

2. Prior to this Court's decision in *Grady* v. *Corbin*, the great majority of state and federal courts agreed that double jeopardy principles did not prohibit successive prosecutions for criminal contempt and substantive criminal offenses based on the same conduct.

Although the issue has not arisen frequently in the federal system, every court of appeals to reach the issue has adopted the majority view. In early decisions on facts directly analogous to those present here, the Sixth and Seventh Circuits each held that a defendant who sold liquor on his premises in violation of an injunction not to do so could be separately prosecuted for criminal contempt for violating the injunction and for a substantive criminal violation of the National Prohibition Act. See *Orban* v. *United States*, 18 F.2d 374 (6th Cir. 1927); *Hansen* v. *United States*, 1 F.2d 316 (7th Cir. 1924); see also *Lewinsohn* v. *United States*, 278 F. 421, 428 (7th Cir. 1921), cert. denied, 258 U.S. 630 (1922). The Eighth and District of Columbia Circuits have held that contempt of court may be prosecuted separately from substantive criminal offenses based on the same violations in cases in which the contempt consisted not of violation of a court order, but of a scheme to misrepresent material facts to a court considering a settlement of litigation, *O'Malley* v. *United States*, 128 F.2d 676, 684 (8th Cir. 1942), rev'd on other grounds, 317 U.S. 412 (1943), or assaulting a prosecutor during a robbery trial, *United States* v. *Rollerson*, 449 F.2d 1000 (D.C. Cir. 1971) (summary contempt).[7] See

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[7] In *United States* v. *Garcia-Pupo*, 845 F.2d 8 (1st Cir. 1988), the court held that contempt of court under 18 U.S.C. 401(1) and retaliation against a government informant under 18 U.S.C. 1513 are

also *Merchants' Stock & Grain Co.* v. *Board of Trade,* 201 F. 20, 27 (8th Cir. 1912); *United States* v. *Ferrugia,* 604 F. Supp. 668, 672-673 (E.D.N.Y. 1985) (summary contempt); *United States* v. *Mirra,* 220 F. Supp. 361 (S.D.N.Y. 1963) (assault on prosecutor during trial; summary contempt); *Chicago Directory Co.* v. *United States Directory Co.,* 123 F. 194 (C.C.S.D.N.Y. 1903) (submission of false documents to court).[8]

Similarly, every state supreme court to consider the issue prior to *Grady* had held that the Double Jeopardy Clause does not bar separate prosecutions for contempt of court and substantive criminal violations based on the same act. A number of those cases arose from facts virtually identical to those presented in *Foster.* For example, in *People* v. *Totten,* 514 N.E.2d 959 (Ill. 1987), the defendant had battered his wife in violation of a court order and had been convicted of criminal contempt after a trial-like proceeding. The court held that the contempt conviction did not bar a separate criminal prosecution for aggravated battery.[9] Accord *Commonwealth* v. *Allen,* 486 A.2d

distinct offenses. The court noted that "none of the concerns addressed by [the Double Jeopardy Clause] are present" when a defendant is prosecuted separately for those two offenses arising out of a single in-court assault, 845 F.2d at 11-12, but the court did not reach the ultimate question whether such separate prosecutions would be permissible.

[8] Two district courts have taken the opposite view, that a prosecution for contempt may bar separate prosecution for a substantive criminal offense. See *United States* v. *Haggerty,* 528 F. Supp. 1286, 1295-1298 (D. Colo. 1981) (contempt proceeding for violating injunction against striking against government and prosecution under statute prohibiting such strikes); *United States* v. *United States Gypsum Co.,* 404 F. Supp. 619 (D.D.C. 1975) (contempt proceeding for violating injunction against price-fixing and prosecution for substantive antitrust violation).

[9] In another case also adjudicated in the *Totten* opinion, the court similarly held that a defendant convicted of summary contempt for striking the prosecutor in court could be separately prosecuted for aggravated battery.

363 (Pa. 1984) (assaulting wife in violation of court order), cert. denied, 474 U.S. 842 (1985); see also *State* v. *Newell,* 532 So.2d 1114 (Fla. Dist. Ct. App. 1988) (pouring acid on wife's car in violation of court order); *State* v. *Sammons,* 656 S.W.2d 862 (Tenn. Crim. App. 1982) (kidnapping child in violation of court order).

Other cases have addressed a variety of fact patterns in which a single act constituted both criminal contempt of court and a substantive criminal violation. In each case, the court held that successive prosecutions were not barred. See *State* v. *Chapman,* 739 P.2d 310 (Idaho 1987) (violation of court order by kidnapping daughter); *Long* v. *Commonwealth,* 197 S.W. 843 (Ky. 1917) (summary contempt for assaulting witness outside court and criminal assault); *Commonwealth* v. *Gallarelli,* 362 N.E.2d 923 (Mass. 1977) (conspiracy to bribe juror); *Church* v. *State,* 111 So. 2d 228 (Miss. 1959) (violation of injunction by committing liquor law violations); *State* v. *Yancy,* 4 N.C. 133 (1814) (summary contempt for assault in court); *Maples* v. *State,* 565 S.W.2d 202 (Tenn. 1978) (summary contempt for instituting fraudulent proceeding and giving false testimony); *Barrowman* v. *State ex rel. Evans,* 381 S.W.2d 251 (Tenn. 1964) (violation of injunction by committing liquor law violations); *Nicholas* v. *Commonwealth,* 45 S.E.2d 305 (Va. 1947) (violation of injunction by committing liquor law violations); see also *Ex parte Morris,* 227 P. 914, 915-917 (Cal. 1924); *Ex parte Allison,* 90 S.W. 870 (Tex. 1906) (violation of injunction by committing gambling law violations); *Fisher* v. *McDaniel,* 64 P. 1056 (Wyo. 1901) (bribing a witness).[10]

[10] Contra *State* v. *Hope,* 449 So. 2d 633 (La. Ct. App. 1984). In *State* v. *Thompson,* 659 P.2d 383 (1983), the Oregon Supreme Court

Many of the cases cited above have relied on the fact that the elements of criminal contempt are entirely different from the elements of the substantive criminal offenses at issue in those cases and that contempt and the substantive offenses are thus not "the same offense" under the traditional "elements" test that this Court described in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). See, *e.g.*, *United States* v. *Ferrugia*, 604 F. Supp. at 671-673; *People* v. *Totten*, 514 N.E.2d at 965; *Commonwealth* v. *Gallarelli*, 362 N.E.2d at 926; *Commonwealth* v. *Allen*, 486 A.2d at 368-370. Other cases have emphasized that the interest underlying criminal contempt—the vindication of the court's authority to protect the integrity of its proceedings and to enforce its orders—is entirely distinct from the interests supporting substantive criminal statutes that prohibit, for example, assault or the sale of liquor. See, *e.g.*, *Ex parte Morris*, 227 P. at 916; *Long* v. *Commonwealth*, 197 S.W. at 843-844; *State* v. *Sammons*, 656 S.W.2d at 868. Finally, some courts have relied on the fact that the court, not the executive branch, typically initiates criminal contempt prosecutions, and that barring substantive criminal prosecutions after a contempt prosecution would in effect give the court the power to control the executive branch's exercise of its power and duty to enforce the criminal law. See, *e.g.*, *Commonwealth* v. *Allen*, 486 A.2d at 367.[11] In short, the rationale in these cases has

held that a prosecution for criminal trespass was barred because the defendant had previously been convicted of contempt for violating an injunction forbidding him from entering a neighbor's land. The court, however, expressly declined to decide the case on federal constitutional grounds, instead basing its decision on a state statute precluding separate prosecution for two or more offenses arising from the same criminal episode. 659 P.2d at 387.

[11] In summary contempt cases, some courts have also relied on the fact that the defendant was never subject to "trial" in the contempt case and thus not put into jeopardy a second time when he was tried

varied, but the critical point is this: Prior to *Grady*, the overwhelming consensus was in accord with this Court's statements in *Debs* and *Chapman* that criminal contempt and a substantive criminal violation arising from the same act are not the "same offense" and may be separately prosecuted.

3. Since this Court's decision in *Grady*, a conflict has developed concerning whether successive prosecutions for criminal contempt and substantive criminal violations arising from the same act are permissible. In addition to the decision of the District of Columbia Court of Appeals in this case, the highest courts of Hawaii and South Carolina have held that *Grady* bars successive prosecutions in cases in which a defendant was held in criminal contempt for violating the terms of an injunction issued in a domestic relations case, and prosecuted for a substantive criminal offense based on the same conduct. See *State* v. *Kipi*, 811 P.2d 815 (Haw.), cert. denied, 112 S. Ct. 194 (1991); *State* v. *Magazine*, 393 S.E.2d 385 (S.C. 1990).[12]

The only other post-*Grady* decision from the highest court of a state with criminal jurisdiction has adhered to the traditional rule. In *Ex parte Williams*, 799 S.W.2d 304 (Tex. Crim. App. 1990) (en banc), the defendant shot and injured two neighbors in violation of an injunction forbidding him from causing or threatening to cause bodily injury to the neighbors. He was convicted of criminal con-

for the substantive criminal offense. See, *e.g.*, *Merchants' Stock & Grain Co.* v. *Board of Trade*, 201 F. at 26-27; *United States* v. *Mirra*, 220 F. Supp. 361, 366 (S.D.N.Y. 1963). That rationale is inapplicable in cases such as this, involving non-summary convictions for criminal contempt.

[12] A number of lower state courts have reached similar results in post-*Grady* decisions. See *State* v. *Mojarro*, 816 P.2d 260 (Ariz. Ct. App. 1991); *In re D'Attomo*, 570 N.E.2d 796 (Ill. App. Ct. 1991); *State* v. *Vanselow*, 572 N.E.2d 269 (Ohio Mun. Ct. 1991); *State* v. *White*, 591 A.2d 954 (N.J. Super. Ct. App. Div. 1991).

tempt and sentenced to 30 days' imprisonment in proceedings in which the State did not participate. The Texas Court of Criminal Appeals held that the contempt adjudication and sentence did not bar his subsequent prosecution for attempted capital murder.[13]

Noting that a private party, not the State, initiated and prosecuted the criminal contempt proceedings, 799 S.W.2d at 307 & n.8, the *Williams* court found the case to be controlled by the reasoning underlying the "dual sovereignty doctrine," which holds that prosecutions by different sovereigns for offenses arising from the same criminal acts do not violate the Double Jeopardy Clause.[14] See, *e.g.*, *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985); *United States* v. *Wheeler*, 435 U.S. 313, 329-330 (1978).

The court of appeals in this case expressly rejected the *Williams* court's result and analysis.[15] App., *infra*, 18a-19a. There is thus a square conflict between the decision in this case, as well as those in *Kipi* and *Magazine*, and the decision in *Williams*.

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[13] An intermediate state appellate court in Illinois has also rejected a similar double jeopardy argument after *Grady*. See *People* v. *Heard*, 566 N.E.2d 896 (Ill. App. Ct. 1991).

[14] The court declined to reach the question whether "all contempt adjudications"—even those in which the contempt conviction is sought by an agent of the State—"as offenses against the court, are by their nature 'different offenses' from statutory violations committed 'against the peace and dignity of the State.' " 799 S.W.2d at 307 n.11.

[15] The court of appeals found it significant that *Williams* did not discuss the impact of *Grady* on its decision. App., *infra*, 17a. The Texas Court of Criminal Appeals, however, was plainly aware of *Grady* and cited it in its opinion, see 799 S.W.2d at 307; the "dual sovereignty" analysis ultimately employed by the *Williams* court did not require further discussion of *Grady*.

4. This Court currently has under submission the case of *United States* v. *Felix*, No. 90-1599. That case presents questions regarding the effect of *Grady* v. *Corbin* on successive prosecutions for related criminal offenses. Although the Court's decision in *Felix* may clarify the scope of *Grady*, it is unlikely to resolve the issues raised in this petition, which involve the relationship between two different kinds of criminal proceedings. As defined by the legislature, the crimes at issue in this case—criminal contempt on the one hand, and assault and cocaine possession on the other—are plainly not the same offense. If they are to be regarded as the same offense, it is only because a court has ordered a party not to engage in criminal behavior, on pain of contempt. The question whether a contempt can be converted into the "same offense" as a statutory crime by virtue of the terms of a court's injunction is not presented in the *Felix* case. In addition, the *Felix* case does not involve the relationship between two independent branches of government, each of which has interests that may be vindicated by criminal proceedings. Accordingly, we believe that this case warrants review regardless of the Court's disposition of the *Felix* case.

5. As these cases demonstrate, *Grady* v. *Corbin* continues to sow confusion in the law of double jeopardy. In our view, *Grady* did not intend to draw into question well-established principles concerning prosecutions of the sort at issue here. If our interpretation of *Grady* is incorrect, however, it may be appropriate for the Court to reconsider the reasoning and result in that case.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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JANUARY 1992

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 88-1375

UNITED STATES, APPELLANT

v.

ALVIN J. DIXON, APPELLEE

No. 89-449

MICHAEL FOSTER, APPELLANT

v.

UNITED STATES, APPELLEE

Appeals from the Superior Court of the
District of Columbia

(Hon. Curtis E. von Kann, Trial Judge in No. 88-1375)
(Hon. Evelyn E.C. Queen, Trial Judge in No. 89-449)

ON REHEARING EN BANC

(Argued en banc January 10, 1990
Decided October 31, 1991)

Before ROGERS, *Chief Judge,* FERREN, TERRY, STEADMAN, and SCHWELB, *Associate Judges,* and NEWMAN* and BELSON,** *Senior Judges.*

TERRY, *Associate Judge*: These consolidated appeals, which present the same issue, arise from trial court rulings on motions to dismiss indictments on the ground of double jeopardy. In one case the motion was granted; in the other it was denied. We hold that both motions should have been granted because both prosecutions were barred by the Double Jeopardy Clause of the Fifth Amendment. Accordingly, we affirm in one case (*Dixon*) and reverse in the other (*Foster*).[1]

Appellant Foster was prosecuted for criminal contempt for violating civil protection orders obtained by his wife and mother-in-law. After a bench trial in August 1988, he was convicted on four counts of criminal contempt, two of which were based on assaults committed against his wife on November 6, 1987, and May 21, 1988. He was acquitted, however, on eighteen additional counts, including those based on threats allegedly made against his wife on November 12, 1987, March 26, 1988, and May 17, 1988. The court later sentenced Foster to an aggregate of 600 days' imprisonment.

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* Judge Newman was an Associate Judge of the court at the time of argument. He was commissioned as a Senior Judge on March 11, 1991.

** Judge Belson was an Associate Judge of the court at the time of argument. He was commissioned as a Senior Judge on July 24, 1991.

[1] The two cases were originally argued before different divisions of this court. After each division became aware that both cases presented the same issue, the court *sua sponte* voted to consolidate them and rehear them together en banc.

In January 1989 Foster was charged in a five-count indictment with one count of simple assault,[2] one count of assault with intent to kill,[3] and three counts of threats to injure another person.[4] The two assault charges were based upon the same assaults which underlay Foster's contempt convictions, and the threats charges were based on the same alleged threats for which Foster had been acquitted of contempt. Foster moved to dismiss the indictment on the grounds of double jeopardy and collateral estoppel. The trial court denied the motion, and Foster noted an appeal.[5]

Appellee Dixon, while on pretrial release pending trial for second-degree murder, was arrested and indicted for possession of cocaine with intent to distribute it (PWID).[6] The trial court issued an order directing Dixon to show cause why he should not be held in contempt for violating a condition of his pretrial release, namely, to refrain from committing any criminal offense. At the hearing on the show cause order, the court found beyond a reasonable doubt that Dixon had possessed cocaine with intent to distribute it. Dixon was therefore adjudicated in criminal contempt for violating the conditions of his release and sentenced to 180 days in jail. He then filed a motion in the PWID case to dismiss the indictment on the ground of double jeopardy. The judge to whom the PWID case had been assigned granted the motion in a published opinion. *United States v. Dixon,* 117 Daily Wash. L. Rptr. 9 (D.C.

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[2] D.C. Code § 22-504 (1989).

[3] D.C. Code § 22-501 (1989).

[4] D.C. Code § 22-2307 (1989).

[5] The denial of a motion to dismiss an indictment or information on the ground of double jeopardy is immediately appealable. *Abney v. United States,* 431 U.S. 651 (1977).

[6] D.C. Code § 33-541 (a)(1) (1988).

Super. Ct. September 26, 1988). From that dismissal the government appeals.

In light of the recent Supreme Court decision in *Grady v. Corbin,* 110 S. Ct. 2084 (1990), we hold that the court in *Foster* erred in denying the motion to dismiss on the ground of double jeopardy. At the same time, we uphold the trial court's dismissal of the indictment in *Dixon,* again relying on *Grady v. Corbin.*

I

A. *Foster*

1. *The Contempt Proceedings*

On August 12, 1987, Judge Tignor of the Superior Court, sitting in the Intra-Family Branch of the Family Division, issued a civil protection order (CPO) stating that Michael Foster "shall not molest, assault, or in any manner threaten or physically abuse" his estranged wife, Ana Virginia Foster, for a period of twelve months from the date of the order. On the same day Judge Tignor issued a second CPO directing Foster not to "molest, assault, or in any manner threaten or physically abuse" Elvira Rivas, Mrs. Foster's mother. The CPO affecting Mrs. Rivas contained the added condition that Foster stay away from her home and place of work. Foster consented in writing to both orders.

Within a fairly short time, however, Foster began to violate these orders, particularly the one relating to his wife. On September 22, and again on November 19, Mrs. Foster filed motions to adjudicate Mr. Foster in contempt, asserting that he had violated the terms of the order. The second motion included allegations that on November 6 Foster "grabbed Petitioner and threw her against a parked car" and that on November 12 he "called Petitioner at

home and threatened her. . . ." Mrs. Foster filed a third motion on May 24, 1988, alleging additional violations of the CPO. This motion stated that on March 26 Foster "called threatening Petitioner," that on May 17 he "called . . . threatening to kill the Petitioner," and that on May 21 he "threw Petitioner down basement stairs, kicking her body. Respondent also pushed her head into the floor causing head injuries. Petitioner lost consciousness." In all, Mrs. Foster alleged sixteen violations of the CPO. Mrs. Rivas also filed a motion to adjudicate Foster in contempt, alleging six violations of the CPO pertaining to her.[7]

In August 1988 Judge Murphy presided over a three-day bench trial on the various charges of criminal contempt in the intra-family case. Mrs. Foster and Mrs. Rivas, both represented by counsel, were the petitioners, and Mr. Foster was the respondent. The United States was not a party and was not represented at that trial.[8] Eight witnesses testified in support of the contempt motions, including Mrs. Foster, Mrs. Rivas, and other family members. Photographs, medical records, and other items of tangible evidence were also admitted.

Mrs. Foster identified her husband as the man who had beaten her on November 6, 1987, near her place of work, and on May 21, 1988, at her apartment on Argonne Place, N.W. She also said he had threatened her on November 12, 1987, March 26, 1988, and other occasions. With respect to the November 6 assault, the court heard additional testimony from Mrs. Rivas and from a police officer, Kenneth White. Several witnesses testified about the

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[7] In a separate proceeding, Mrs. Foster moved for an extension of the civil protection order. *See Cruz-Foster v. Foster,* No. 90-1217 (D.C. October 17, 1991).

[8] We assume, for the purposes of this appeal, that the United States Attorney's Office had no notice of the contempt proceeding.

May 21 assault. Mrs. Foster said that Mr. Foster grabbed her and threw her down the basement stairs, then kicked her and hit her on the head until she lost consciousness. A neighbor, Ana Ruchlozo, said that she saw Mr. Foster in the apartment building on May 21, headed in the direction of the basement. Bryan Connell, a security guard, saw Mrs. Foster shortly after the assault and described her injuries ("she was bleeding very badly from the forehead [and] had very, very deep cuts on her forehead"). Connell testified that he also saw a man wielding a machete in the basement of the building soon after Mrs. Foster was injured, but that the man with the machete "was not Michael Foster." Medical records and photographs were introduced to document Mrs. Foster's injuries.

At the close of the petitioners' case, Mr. Foster's counsel moved for a judgment of acquittal on all counts. The court granted the motion with respect to seven counts, including those involving threats alleged to have been made by Foster on November 12 and May 17.[9] As to the remaining charges, however, the motion was denied.

Foster then took the stand in his own defense. He denied assaulting his wife on May 21, 1988, stating that he was in Norfolk, Virginia, visiting relatives on that date. He also denied assaulting his wife on November 6, 1987, or making threatening telephone calls to her at any time, including March 26, 1988. Finally, Foster testified that he had not threatened his mother-in-law but, to the contrary, had complied with the terms of the CPO.

The court found Foster guilty on four counts of criminal contempt, including those based upon the No-

[9] Mrs. Foster's attorney conceded that she had failed to sustain her burden of proof on four of the seven counts and asked to "withdraw" those counts. The court made clear, however, that jeopardy had attached as to those counts and granted judgments of acquittal instead.

vember 6, 1987, and May 21, 1988, assaults on Mrs. Foster.[10] As to those, the judge said:

> The Court is satisfied beyond a reasonable doubt that you did, contrary to your testimony, assault your wife near Kalorama Park, 11/6/87, that leading to the injuries described and testified to.
>
> The Court is also satisfied beyond a reasonable doubt that you committed the assault alleged to have occurred, and the Court is satisfied did in fact occur on May 21st, 1988, at the Argonne address, which led to your wife's hospitalization.

The court found Foster not guilty, however, of the remaining counts of criminal contempt, including the threats allegedly made against Mrs. Foster on March 26, 1988.

2. *Subsequent Criminal Proceedings*

On July 21, 1988, about two weeks before the contempt trial, the United States Attorney's Office filed a complaint charging Foster with a single count of assault with intent to kill while armed. The complaint and supporting affidavit alleged that on May 21, 1988, Michael Foster assaulted and tried to kill his wife, Ana Foster, at her apartment on Argonne Place. After a preliminary hearing, Foster was held for further action by the grand jury. Some time later—after the contempt trial—Foster filed a motion to dismiss the complaint and enjoin the grand jury proceedings, but while that motion was pending, the grand jury on January 19, 1989, returned a five-count indictment charging Foster with one count of simple assault, three

[10] The court also found Foster guilty of contempt based on threats made against his wife on November 17, 1988, and a November 4, 1987, violation of the stay-away order relating to Mrs. Rivas.

counts of threats, and one count of assault with intent to kill. The offenses were alleged to have occurred on November 6, 1987 (simple assault, count I), November 12, 1987 (threats, count II), March 26, 1988 (threats, count III), May 17, 1988 (threats, count IV), and May 21, 1988 (assault with intent to kill, count V); Mrs. Foster was named as the complainant in all five counts. All of these charges were based on events for which Foster had already been tried in the contempt proceeding before Judge Murphy. The November 6 and May 21 assaults were the basis of two of his contempt convictions, while the three charges of threats were based on incidents for which Foster was acquitted in the contempt trial.

Foster filed a motion to dismiss the indictment on the same double jeopardy grounds asserted in his previous motion to dismiss the complaint. In addition, with respect to counts II, III and IV, he moved to dismiss on the ground of collateral estoppel. In its opposition the government admitted that the five offenses alleged in the indictment were the same as those for which Foster had already been tried in the contempt proceeding. The government maintained, however, that principles of double jeopardy did not bar further prosecution because the legislature intended to allow multiple punishments, and because the contempt in this case was different from a substantive criminal offense.

The trial court denied the motion to dismiss in an oral ruling, followed a week later by a written order. Citing *United States v. Rollerson,* 308 F. Supp. 1014 (D.D.C. 1970), *aff'd*, 145 U.S. App. D.C. 338, 449 F.2d 1000 (1971), a summary contempt case, the court said in its order that under *Blockburger v. United States,* 284 U.S. 299 (1932), "the charges currently before the Court are not duplicative of the contempt charges of which defendant was convicted in 1988." The court continued:

> In the Intrafamily case defendant was found to be in violation of a Civil Protection (consent) Order whereby he was found to be in criminal contempt of Court. The elements of criminal contempt are "a contemptuous act and a wrongful state of mind". *See [In re] Gorfkle,* 444 A.2d 934, 939 (D.C. 1982), citing *In re Farquhar,* 160 U.S. App. D.C. 295, 298, 492 F.2d 561, 564 (1973). . . . [N]one of the charges has as an element a contemptuous act or a wrongful state of mind.

Referring to D.C. Code § 16-1002(c) (1989), the court concluded that "there is clearly an intent by the legislature to allow different remedies for a violation of Civil Protection Orders: one for contempt after willful violation of the order to protect the petitioner and the ability of the Court to enforce its orders, and additional proceedings in the Criminal Division to protect the community."[11] Neither the oral ruling nor the written order addressed Foster's collateral estoppel argument.

B. *Dixon*

On March 9, 1987, appellee Dixon was arrested on a charge of second-degree murder while armed. He was later released on a $1500 surety bond. The printed release form contained a provision that Dixon's freedom was conditioned upon his not committing a criminal offense. Some time later the grand jury returned an indictment charging him with first-degree murder while armed. On January 15, 1988, while awaiting trial on the murder charge, Dixon was

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[11] D.C. Code § 16-1002(c), which is part of the Code chapter dealing with intra-family proceedings generally, provides in pertinent part:

> The institution of criminal charges by the United States Attorney shall be in addition to, and shall not affect[,] the rights of the complainant to seek any other relief under this chapter.

This language was quoted by the trial court in its order.

arrested for possession of cocaine with intent to distribute it, and on January 21 he was indicted for that offense.

The government then filed a motion requesting modification of the conditions of Dixon's release in the murder case in light of his indictment on the cocaine charge. Judge Walton, to whom the murder case was assigned, issued an order requiring Dixon to "show cause why he should not be held in contempt of court or have the conditions of his pretrial release modified." The order noted that "[a]mong the conditions of [Dixon's] pretrial release imposed by the court [was the requirement] that he '[r]efrain from committing any criminal offense. . . .' " The order advised Dixon of his right to be represented by counsel at the hearing and to present evidence in his own behalf.

The testimony of four Metropolitan Police officers at the show cause hearing established that on the afternoon of January 15, 1988, two officers patrolling in an unmarked police car saw Dixon and a woman standing outside an apartment building in an area that was a known "open air market" for narcotics. The officers watched as the woman handed Dixon some money. Then, as the officers got out of their car, Dixon saw them and fled into the apartment building and up the staircase, carrying a bundle of white packets in his hand. When he reached the second story landing, Dixon dropped the bundle of packets; the officers recovered it and placed Dixon under arrest. Within the bundle were nineteen zip-lock plastic bags, bound by a rubber band, containing 2716 milligrams of cocaine (approximately 150 to 200 milligrams per bag). Dixon's counsel cross-examined the government witnesses and introduced evidence on Dixon's behalf. After each side had presented closing arguments, Judge Walton "conclude[d] that the government ha[d] established beyond a reasonable doubt that [Dixon] was in possession of drugs and that those drugs were possessed with the intent to distribute them." Since such possession was a violation of a condition of Dixon's release, the judge found him guilty of criminal contempt under D.C. Code § 23-1329 (c) (1989)[12] and sentenced him to 180 days in jail.

Dixon thereafter moved to dismiss the cocaine indictment, arguing that prosecution on that charge was barred by the Double Jeopardy Clause. The court granted the motion, reasoning that the drug charge was the "same offense" as the criminal contempt conviction, and citing *Blockburger v. United States, supra,* 284 U.S. at 304, as stating the applicable test for determining whether the two offenses were the same for double jeopardy purposes. Dixon's alleged contempt had been based on that part of the court's release order directing him to refrain from committing any criminal offense. To prove the contempt, the government had presented evidence that he possessed nineteen packets of cocaine with the specific intent to distribute them. The court said:

> These are precisely the same *facts* which the government would need to prove in the instant [drug] case in order to secure a conviction, and no additional facts

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[12] D.C. Code § 23-1329 provides in pertinent part:

> (a) A person who has been conditionally released pursuant to section 23-1321 and who has violated a condition of release shall be subject to revocation of release, an order of detention, and prosecution for contempt of court.
>
> • • • • •
>
> (c) Contempt sanctions may be imposed if, upon a hearing and in accordance with principles applicable to proceedings for criminal contempt, it is established that such person has intentionally violated a condition of his release. Such contempt proceedings shall be expedited and heard by the court without a jury. Any person found guilty of criminal contempt for violation of a condition of release shall be imprisoned for not more than six months, or fined not more than $1,000, or both.

> would need to be proven. Thus, while contempt is itself a general intent offense, the particular contempt of which [Dixon] was convicted included a specific intent element as a necessary component of proving the commission of a criminal offense.

United States v. Dixon, supra, 117 Daily Wash. L. Rptr. at 13 (emphasis in original).

The court also rejected the government's argument, based on *Albernaz v. United States,* 450 U.S. 333 (1981), that even if the offenses were not separate and distinct under a *Blockburger* analysis, the *Blockburger* test was solely a rule of statutory construction and did not control when there was a clear indication of contrary legislative intent. The government argued that Congress clearly intended contempt of court and drug trafficking to be separate offenses: the contempt statute was designed to preserve the authority of the court and the integrity of the judicial process, whereas the purpose of the drug statute was to protect society from the evils of drug trafficking. The court, however, interpreted *Albernaz* as saying only that a contrary legislative intent could defeat multiple punishments otherwise allowable under *Blockburger*: *Albernaz,* said the court, "certainly does not hold that multiple prosecution or punishment of offenses which *fail* the *Blockburger* test is nonetheless permissible if the legislature manifested a clear intention to authorize such multiple punishments." *United States v. Dixon, supra,* 117 Daily Wash. L. Rptr. at 13 (emphasis in original), citing *Albernaz, supra,* 450 U.S. at 345 (Stewart, J., concurring).

Finally, the court acknowledged that a judge's unilateral decision to conduct a criminal contempt hearing would preempt subsequent prosecution for the offense which also constituted the contempt. The court suggested, however, that the government could avoid such a result by requesting the judge to defer the contempt proceeding. The

court reasoned that "[i]n most—but perhaps not all—instances, it would seem appropriate to accommodate that request and give the government a reasonable opportunity to prosecute the substantive offense." *United States v. Dixon, supra,* 117 Daily Wash. L. Rptr. at 17.

II

The Double Jeopardy Clause protects persons charged with crimes in three different but related ways. "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969) (footnotes omitted). The two cases before us implicate the first two protections. Appellant Foster seeks to bar a second prosecution for the assaults that led to his contempt convictions, as well as a second prosecution on the threats charges for which he was found not guilty in the contempt proceeding. Appellee Dixon likewise seeks, and in fact has been granted, protection from being twice prosecuted for possession of cocaine with intent to distribute it.

In the briefs and at oral argument, the parties presented elaborate discussions in support of their respective positions on the subject of double jeopardy. The opinion of the trial judge in *Dixon* likewise analyzed at length the issues as he saw them. Soon after we heard oral argument, however, the Supreme Court decided the case of *Grady v. Corbin,* 110 S. Ct. 2084 (1990). That decision has greatly simplified the issues and has made our task much easier than it was when these cases first landed on our docket. With *Grady* on the books, we need not consider most of the arguments presented by the parties or the points made by the trial court in *Dixon.* Rather, we hold that *Grady* is

controlling and that it requires us to sustain the claim of double jeopardy in both cases.

In *Grady v. Corbin* the defendant, Thomas Corbin, received two traffic tickets after his automobile crossed the center line on a New York highway and struck two oncoming cars, causing the death of one person and injuries to another. One ticket charged Corbin with the misdemeanor of driving while intoxicated,[13] and the other charged him with failing to keep to the right of the median. Within a few days, the district attorney's office began to gather evidence for a homicide prosecution. Corbin, however, appeared before a town justice court about three weeks later and pleaded guilty to both traffic charges. No member of the district attorney's office was present, and the presiding judge was unaware of the fatality or of the pending homicide investigation. The judge accepted the plea and later imposed a $350 fine and suspended Corbin's license for six months.

Two months after that, a grand jury indicted Corbin on several charges, including manslaughter and third-degree reckless assault, arising out of the traffic accident. Corbin challenged the indictment on double jeopardy grounds. The New York Court of Appeals sustained his challenge, and the state brought the case to the Supreme Court. That Court, adopting a "suggestion" made in *Illinois v. Vitale,* 447 U.S. 410, 420 (1980), held that the Double Jeopardy Clause bars a second prosecution "if the prosecution [seeks] to establish an essential element of the second crime by proving the conduct for which the defendant was convicted in the first prosecution." *Grady v. Corbin, supra,* 110 S. Ct. at 2087.

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[13] A blood test, taken shortly after the accident, revealed that Corbin had a blood alcohol level of .19, almost twice the level at which it is illegal to operate a motor vehicle in New York.

The Court in *Grady* began its analysis by referring to "the traditional *Blockburger* test" for determining whether one offense is a lesser included offense of another:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Blockburger v. United States, supra, 284 U.S. at 304, cited in *Grady v. Corbin, supra,* 110 S. Ct. at 2090. The Court concluded, however, that *Blockburger* did not fully resolve the double jeopardy issue:

> [A] subsequent prosecution must do more than merely survive the *Blockburger* test. As we suggested in [*Illinois v.*] *Vitale,* the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.

Id. at 2093 (footnote omitted.) This is not, the Court said, an "actual evidence" or "same evidence" test. "The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct." *Id.*

Our focus here, then, must be on the conduct underlying the contempt convictions of Mr. Dixon and Mr. Foster, rather than on the nature of the evidence or the identity of the witnesses at the two contempt trials. It is for this reason that we have summarized in some detail the facts presented at each of the contempt proceedings. Given those facts, and given the criminal charges against each defendant, it is obvious—indeed, it is undisputed—that the conduct which underlay their contempt prosecu-

tions included, in whole (*Dixon*) or in part (*Foster*), the very same conduct for which the government now seeks to try them in the two pending criminal cases. *Grady v. Corbin* compels us to hold that those cases cannot be tried, now or ever. The Double Jeopardy Clause forever bars any further prosecution of either Dixon or Foster for the conduct which led to their contempt convictions or, in Foster's case, any conduct charged which the court, after hearing the evidence, held did not constitute contempt.

We note that the highest courts of at least two states, in post-*Grady* cases, have come to the same conclusion which we reach today. In *State v. Magazine,* 302 S.C. 55, 393 S.E.2d 385 (1990), the Supreme Court of South Carolina held that a contempt conviction for violating a civil protection order issued by a family court barred a subsequent prosecution for assault and battery based on the same facts which constituted the contempt. Because the state, in the assault trial, "proved the same conduct for which appellant was previously criminally sanctioned by the family court," the court held that, "under the [*Grady v.*] *Corbin* test, the successive prosecution in this case violated the Double Jeopardy Clause." *Id.* at __, 393 S.E.2d at 387. More recently, in *State v. Kipi,* 72 Haw. 164, 811 P.2d 815, *cert. denied,* 112 S. Ct. __ (1991), the Supreme Court of Hawaii—citing *State v. Magazine*—affirmed the dismissal of a complaint for burglary and threats because the defendant had previously been convicted of criminal contempt for violating a family court protective order. The contempt had consisted of the defendant's breaking into his former girl friend's home and threatening her and her housemates—the very same conduct which formed the basis of the criminal charges. Recognizing that the Supreme Court had broadened the scope of double jeopardy protection in *Grady v. Corbin*, the Hawaii court held that "under the *Grady* rule" Kipi could not be prosecuted

a second time "for offenses based on the same conduct as the contempt offense for which he was charged, convicted, and sentenced." *Id.* at __, 811 P.2d at 820. Although we are hesitant to proclaim a trend, we find ourselves fully in agreement with these decisions for the reasons we have already stated. *See also State v. Mojarro,* __ Ariz. __, 816 P.2d 260 (Ariz. Ct. App. 1991) (contempt prosecution for refusing to testify, in violation of a court order requiring defendant to testify, requires dismissal of subsequent indictment for "hindering prosecution" by refusing to testify); *State v. Vanselow,* 61 Ohio Misc. 1, 6, 572 N.E.2d 269, 272-273 (Ohio Mun. Ct. 1991) (contempt prosecution for violating protective order issued by domestic relations court bars subsequent criminal prosecution for same conduct).

Amici urge us to draw a distinction between the two cases before us. Regardless of what we decide in *Dixon,* they maintain that there was no prior jeopardy in *Foster* because the contempt proceeding in that case was initiated by private parties, Foster's wife and mother-in-law. In support of their argument, *amici* rely on a recent case from Texas, *Ex parte Williams,* 799 S.W.2d 304 (Tex. Crim. App. 1990) (en banc), which held that a prosecution for attempted murder was not barred by a prior contempt conviction based on the same conduct. With all due respect, we find the reasoning in *Williams* flawed and its holding unpersuasive.

The most glaring weakness in the *Williams* opinion is its utter failure to discuss *Grady v. Corbin* at all. In fact, *Williams* cites *Grady* only once, as authority for the unremarkable proposition that "the test for what constitutes the 'same offense' can differ according to whether single or successive prosecutions are involved." *Id.* at 307. The *Williams* court simply ignored the obvious fact, recognized specifically by the Hawaii court in *Kipi,* that *Grady*

had "broadened the scope of double jeopardy protection." *State v. Kipi, supra,* 72 Haw. at __, 811 P.2d at 819. With one exception, the several cases cited in *Williams* were all decided before *Grady* and are thus at least suspect as precedent on the issue presented here.[14]

Moreover, the Supreme Court has told us in no uncertain terms that criminal contempt "is a crime in the ordinary sense . . . [and that] convictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same." *Bloom v. Illinois,* 391 U.S. 194, 201 (1968); *see In re Marshall,* 549 A.2d 311, 315 (D.C. 1988) (because "Marshall's conviction of contempt was certainly for a criminal violation," he was required, like any "person convicted" of a crime, to pay a specified sum to the Crime Victims' Compensation Fund). Case law has emphasized that the "impact on the individual defendant" is the main concern in determining whether jeopardy has or has not attached. *See, e.g., United States v. Wilson,* 420 U.S. 332, 343 (1975) (double jeopardy protections are based on "principles of fairness and finality [which] require that [the defendant] not be subjected to the possibility of further punishment"); *United States v. Jorn,* 400 U.S. 470, 479 (1971) (plurality opinion of Harlan, J.) ("society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in [the Double Jeopardy Clause]"); *Green v. United States,* 355 U.S. 184, 187-188 (1957) ("The underlying idea [of the Double Jeopardy Clause], one that is deeply ingrained in [our] system of jurisprudence," is to avoid "subjecting [the defendant] to embarrassment, expense, and ordeal and compelling him to live in a continuing state of

[14] The one exception is *Garcia v. State,* 806 S.W.2d 835 (Tex. Crim. App. 1990) (en banc), which did not involve the contempt/subsequent prosecution issue that confronts us in this case.

anxiety and insecurity"). While these and other cases speak in terms of the state or the sovereign as the prosecuting authority, their emphasis is plainly not on the identity of the prosecutor but on the impact of the trial on the defendant. The *Williams* court, in our view, went astray in failing to recognize this. It is self-evident that the impact of a contempt prosecution on any defendant—exposure to possible fine or imprisonment, or both—would be the same regardless of whether the contempt adjudication is sought by the government or a private party (or even the court itself, as in *In re Marshall, supra*). Thus we note our disagreement with *Williams* and hold that the identity of the prosecuting party in the contempt proceeding is irrelevant to the double jeopardy issue.

Finally, we offer an observation on the limits of our holding in the *Foster* case. The reader should not conclude that civil protection orders can no longer be enforced by contempt proceedings in the post-*Grady* era. The *Grady* Court itself recognized that a single act or transaction may constitute two or more types of "conduct," one of which may be punishable in a contempt proceeding and another in a subsequent criminal proceeding. The Court said that its holding

> would not bar a subsequent prosecution on the homicide and assault charges if the bill of particulars revealed that the State would not rely on proving the conduct for which Corbin had already been convicted (*i.e.*, if the State relied solely on Corbin's driving too fast in heavy rain to establish recklessness or negligence).

110 S. Ct. at 2094 (footnote omitted). Thus the Court envisioned Corbin's act of driving and hitting two other cars as encompassing at least three different types of conduct: driving while intoxicated, failing to keep right of the

median (for both of which he was convicted in traffic court), and driving too fast in heavy rain (for which he was not convicted in traffic court). In like manner, when a civil protection order prohibits assaults and also requires the respondent to stay away from the petitioner, and an assault is committed against the petitioner, the language we have quoted from *Grady* suggests that the breach of the stay-away portion of the order might be punished as a contempt without jeopardizing a later criminal prosecution for the assault itself. That hypothetical case, of course, is not before us today,[15] and thus we go no further than to note the possibility that it might be distinguishable from *Foster*.

For the reasons stated, we affirm the trial court's dismissal of the indictment in *Dixon* and reverse the denial of the motion to dismiss the indictment in *Foster*.

Affirmed as to Dixon,
reversed as to Foster.

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[15] In the contempt proceeding Foster was convicted of one violation of the order to stay away from his mother-in-law, see note 10, *supra*, but the later indictment did not include that incident.

APPENDIX B

SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA

Criminal Case No. F-8415-88

UNITED STATES OF AMERICA

v.

MICHAEL FOSTER

[FILED APR. 14, 1989]

ORDER

This matter is before the Court on defendant's Motion to Dismiss Indictment With Prejudice. The government opposes defendant's motion. In support of this motion defendant contends that to allow prosecution would be in violation of the Double Jeopardy Clause of the 5th Amendment because defendant has already been tried and convicted for these offenses in the Family Division of this Court where defendant was found in contempt for failing to comply with a Civil Protection Order.

The Court has reviewed the record, pleadings, the law, including statutory and case law and the *Amicus Curiae* Brief submitted by the Women's Legal Defense Fund.[1] Upon review the Court finds the following facts:

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[1] This Court granted the Women's Legal Defense Fund leave to appear *amicus curiae* on March 27, 1989.

1. On or about July 29, 1987 Ana V. Foster filed a Petition and Affidavit for Civil Protection Order with the Intrafamily Branch Office of the Superior Court of the District of Columbia (IF-630-87) alleging Threats To Do Bodily Harm, Simple Assault and Destruction of Property.

2. Ana V. Foster is the wife of the defendant.

3. On July 29, 1987 a Temporary Civil Protection Order was signed by Judge Sullivan.

4. A Consent Order was signed and filed on August 12, 1987 whereby defendant promised that he would not molest, assault or in any, manner threaten or physically abuse his wife. The Consent Order was effective August 12, 1987 through August 12, 1988, and extended for twelve (12) months on August 10, 1988 to August 10, 1989.

5. Defendant was found to be in criminal contempt of Court on August 10, 1988 for failing to comply with the Consent Order of the Intrafamily Division.

6. On January 26, 1989 *nunc pro tunc* to October 6, 1988, defendant was sentenced to one hundred fifty (150) days on each of the three counts of contempt, sentences to be served consecutive to one another.

7. On January 19, 1989 an indictment was filed in the instant case charging defendant with Simple Assault in violation of D.C. Code § 22-504, three (3) counts of Threatening to Injure a Person in violation of D.C. Code § 22-2307 and Assault With Intent to Kill in violation of D.C. Code § 22-501.

I.

The issue is whether defendant's conviction for contempt for violation of a Consent Order bars prosecution by the United States Attorneys Office for the conduct punished by sentencing for contempt. The Court finds that it does not.

II.

The charges currently before the Court are not duplicate of the contempt charges of which defendant was convicted in 1988.[2]

In *Blockburger v. United States,* 284 U.S. 299, 304 (1932) it was stated that:

> the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact the other does not.

In the Intrafamily case defendant was found to be in violation of a Civil Protection (consent) Order whereby he was found to be in criminal contempt of Court. The elements of criminal contempt are "a contemptuous act and a wrongful state of mind". *See Matter of Gorfkle,* 444 A.2d 934, 939 (D.C. 1982) citing *In re Farquhar,* 160 U.S. app. D.C. 295, 298 492 F.2d 561, 564 (1973) I submit that none of the charges has as an element a contemptuous act or a wrongful state of mind.

III.

This Court also draws support for the conclusion that double jeopardy does not act to bar prosecution by the United States Attorneys Office from D.C. Code § 16-1002 (c) (1988 Supplement):

> The institution of criminal charges by the United States Attorney shall be in addition to, and shall not affect the rights of the complainant to seek any other relief under this chapter . . .

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[2] *United States v. Rollerson,* 308 F. Supp. 1014 (D.C.D.C. 1970) aff'd, 449 F.2d 1000 (D.C. Cir. 1971).

The statute allows Court intervention and action in the Family Division and the Criminal Division for the same acts. The statute recognizes different interests are protected in the Family Division and Criminal Division.

This Section further protects the defendant's self-incrimination and defense rights because it bars the use of information from the Family proceedings from use against him in the Criminal Division's proceedings.

From this code section there is clearly an intent by the legislature to allow two different remedies for a violation of Civil Protection Orders. One for contempt after wilfull violation of the order to protect the petitioner and the ability of the Court to enforce its orders and additional proceedings in the Criminal Division to protect the community.

IV.

Extensive briefs were provided by the defendant, the United States and the Women's Legal Defense Fund. The Court concludes the *Blockburger Test* in conjunction with D.C. Code § 16-1002(c) (1988 Supplement) permits this prosecution before the Criminal Division.

Accordingly, it is this 13th day of April, 1989.

ORDERED:

That the Motion to Dismiss Indictment With Prejudice is *DENIED.*

/s/ [Signature Illegible]
EVELYN E. CRAWFORD QUEEN
Judge

APPENDIX C

SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA
Criminal Division

F-442-88

UNITED STATES OF AMERICA

v.

ALVIN J. DIXON

OPINION AND ORDER

Introduction

The question presented by this case is whether one who has been convicted of criminal contempt for violating a court order that he not commit any criminal offense while on pretrial release may be subsequently prosecuted for commission of the substantive offense which formed the basis of the contempt conviction. This question has not been definitely answered by the United States Supreme Court, nor has it been addressed by the District of Columbia Court of Appeals. In his motion to dismiss the indictment, defendant argues that his prosecution here for possession with intent to distribute cocaine would violate the Double Jeopardy Clause of the Constitution since he has already been tried and convicted of contempt for violating his release order by engaging in such conduct. For reasons set forth below, this Court concludes that the Double Jeopardy Clause does indeed preclude the instant prosecution. Accordingly, defendant's Motion to Dismiss the Indictment will be granted.

BACKGROUND

On March 9, 1987, defendant was presented before a Commissioner of this Court on a charge of Second Degree Murder While Armed. In specifying the conditions upon which defendant could be released, the Commissioner utilized one of the Court's preprinted release forms which read at the top "YOU ARE HEREBY RELEASED ON THE CONDITIONS INDICATED BELOW: THESE CONDITIONS WILL BE IN EFFECT UNTIL YOUR CASE IS DISPOSED OF OR UNTIL THEY ARE CHANGED OR AMENDED BY A JUDGE." The Commissioner set a $1500 surety bond, ordered the defendant to appear for a line-up, and also checked the line on the form which states "you are to refrain from committing any criminal offense, the penalties for which are explained on the reverse side of this Order."[1] On March 10, 1987, defendant posted the $1500 surety bond and was released.

On January 15, 1988, while he was awaiting trial on the murder charge, defendant was arrested by officers of the Metropolitan Police Department and soon thereafter indicted for Possession of Cocaine With Intent to Distribute. That case was assigned to the undersigned judge, before whom defendant entered a plea of not guilty on February 1, 1988. On February 23, 1988, the government filed a Motion To Modify Bond in defendant's murder case, requesting that "Mr. Dixon be summoned to court to show cause why his conditions of pretrial release should

[1] The reverse side of the release order is headed "YOU ARE NOT TO COMMIT ANY CRIMINAL OFFENSE." Under this language appear several warnings, including the following: "Any violation of these conditions shall subject you to revocation of release, an order of detention, and prosecution for contempt of court (a fine of not more than $1000 or imprisonment [for] not more than 6 months of [sic] both)."

not be modified" because of "his obvious drug use and commission of another offense, as found by the Grand Jury."

On March 29, 1988, Judge Walton, to whom the murder case was assigned, issued an order requiring defendant to "show cause why he should not be held in contempt of court or have the conditions of his pretrial release modified." The order asserted that commission of the offense of Possession of Cocaine With Intent to Distribute, if true, would indicate that defendant had not complied with the release condition that he "refrain from committing any offense." Order of March 29, 1988 in *United States v. Alvin Dixon, Sr.*, F 2670-87.

The order scheduled a hearing for a day in April, stated that defendant was entitled to be represented by counsel and could produce witnesses or evidence on his behalf, and ordered the government "to have the appropriate witnesses present at the hearing and prepared to testify concerning the alleged violation of defendant's pretrial release conditions." *Id.*

On April 14 and 20, 1988, Judge Walton held the ordered show cause hearing.[2] The government presented testimony of four witnesses, all members of the Metropolitan Police Department. Sgt. Larry W. Bailey and Officer Michael J. Cardello testified that on January 15, 1988 they observed defendant standing in front of 1016 4th Street, S.E., holding in his right hand a bundle of packets. Defendant, on seeing the officers, ran into the building. The officers recovered the bundle—containing nineteen plastic bags of apparent cocaine—and then

[2] On April 14, 1988, Judge Walton also amended defendant's release order in the murder case by adding the language "DO NOT USE ILLEGAL DRUGS" and requiring that defendant undergo weekly narcotics testing.

arrested defendant. Officer Joseph P. Roche testified that he took custody of the packets. Detective Charles F. DiDomenico testified that the Drug Enforcement Administration analysis showed that the nineteen plastic packets contained 2716 milligrams of cocaine (or approximately 150-200 milligrams per bag), that packets with this amount of cocaine are called "quarter bags" and usually sell for $25 each, and that possession of nineteen quarter bags bound by a rubber band, as found in this case, would indicate possession with intent to distribute the cocaine. Defendant's counsel cross-examined the government witnesses and offered some evidence for the defense. Following closing arguments by both sides, Judge Walton found that the government had proven beyond a reasonable doubt that defendant was in possession of cocaine with intent to distribute it, in violation of his release order that he refrain from committing any criminal offense. For this contempt of court, Judge Walton sentenced the defendant to imprisonment for six months.[3]

On May 17, 1988 defendant filed in the instant case his motion to dismiss the indictment. The government filed a written opposition. Following oral argument in August 1988, the Court took the matter under advisement in order to conduct some additional research on the issue presented.

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[3] In May 1988, Judge Walton granted defendant's motion to permit the contempt sentence to be served on a work release basis. In June 1988, defendant proceeded to trial on the case before Judge Walton which, by then, involved the charge of First Degree Murder While Armed. Defendant was acquitted of First and Second Degree Murder While Armed but convicted of Voluntary Manslaughter While Armed. Defendant's motion for new trial in that case is now pending.

I. DEFENDANT'S ARGUMENT FOR DISMISSING THE INDICTMENT.

Defendant's motion to dismiss the indictment is grounded on one of the great foundations of liberty derived from the Magna Carta, and now contained in the Fifth Amendment to the United States Constitution, namely, the protection against double jeopardy. That clause, applicable to the District of Columbia by its own terms, *Pernell v. Southall Realty*, 416 U.S. 363, 370 (1973); *Wight v. Davidson*, 181 U.S. 371, 384 (1900); *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1898), and to the states via the Fourteenth Amendment, *Benton v. Maryland*, 395 U.S. 784, 787 (1969), provides "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." The rationale for the protection is that "[w]hen a defendant has been once convicted and punished for a particular crime, principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense." *United States v. Wilson*, 420 U.S. 332, 343 (1975).

Defendant's argument rests on three well-recognized principles of double jeopardy jurisprudence.

First, defendant notes that the Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (footnotes omitted).

Next, the defendant submits that, as the Supreme Court made clear in *Brown v. Ohio*, 432 U.S. 161, 166 (1977), the "established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment" or successive prosecutions is that stated in *Blockburger v. United States*, 284 U.S. 299, 304 (1932); i.e., "[t]he applicable rule is that where the same

act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not."[4]

Finally, defendant argues that the instant prosecution does not require proof of any fact beyond those already required to be proven in the prior contempt trial. In the contempt trial the government was required to prove—and did prove to Judge Walton's satisfaction—that defendant willfully violated a condition of his pretrial release order by committing a criminal offense, namely, possession with intent to distribute cocaine. That necessarily required proof that the defendant knowingly possessed a useable quantity of cocaine with the specific intent to distribute it. The instant prosecution would also require proof that defendant knowingly possessed a useable quantity of cocaine with the specific intent to distribute it, and no additional facts would need to be proven. Thus, defendant argues, the instant case fails the *Blockburger* test and the present indictment must be dismissed on double jeopardy grounds.[5]

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[4] As the District of Columbia Court of Appeals observed in *Kingsbury v. United States,* 537 A.2d 208, 210 (D.C. 1988), the Supreme Court held in *Whalen v. United States,* 445 U.S. 684 (1980), that the *Blockburger* test is made applicable to the District of Columbia by D.C. Code § 23-112.

[5] Additionally, defendant argues that, even where two offenses may be deemed different under *Blockburger,* "successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first." *Brown v. Ohio,* 432 U.S. 161, 166 n. 6. *See Ashe v. Swenson,* 397 U.S. 436 (1970); *In Re Nielsen,* 131 U.S. 176 (1889). *Accord, United States v. Felder,* No. 87-871 (D.C. Sept. 16, 1988). Because of its holding that the present case does involve the "same offense" (in the *Blockburger* sense) as that involved in defendant's contempt conviction, the Court need not consider whether this "collateral estoppel" branch of double jeopardy is applicable to the instant case.

II. IS THE BLOCKBURGER TEST MET HERE?

The government's initial response to defendant's motion is to argue that the present prosecution does not, under *Blockburger,* involve the same offense as that addressed in the contempt trial. Thus, the government contends, citing *In Re Gorfkle,* 444 A.2d 934, 939 (D.C. 1982), conviction in the contempt matter required proof of two elements, namely, (1) existence of a court order and (2) willful disobedience of the same. Possession With Intent to Distribute Cocaine involves three elements, namely, (1) that defendant possessed cocaine (2) that his possession was knowing and intentional, and (3) that he possessed it with the specific intent to distribute it. *See* Criminal Jury Instruction for the District of Columbia No. 4.32. Hence, the government argues, the elements of these two prosecutions are different since the present case requires proof of a specific intent (to distribute cocaine) while contempt is a general intent crime. *See Sykes v. United States,* 144 U.S. App. D.C. 53, 444 F. 2d 928 (1971); *In Re Hunt,* 367 A.2d 155 (D.C. 1976), *cert. denied,* 434 U.S. 817 (1977).

The government's argument is unsound because it mistakenly focuses on the "elements" of contempt and possession with intent to distribute cocaine. *Blockburger,* however, does not depend upon a comparison of the elements of offenses, or even whether the same or different evidence will be presented in each trial. Rather, the question is whether each provision requires proof of a *fact* which the other does not. *Blockburger v. United States, supra,* 284 U.S. at 304. *Accord, Kingsbury v. United States,* 537 A.2d 208, 211 (D.C. 1988).

In this case, the defendant's alleged contempt did not rest on violating general conditions of his pretrial release order, such as reporting to the Pretrial Services Agency for testing or staying away from prosecution witnesses.

Rather, it rested on that part of the order which directed him "to refrain from committing any criminal offense."[6] Accordingly, to obtain a conviction for this contempt, the government had to prove the commission of a criminal offense. The government undertook to do so by proving that at 5:00 p.m. on January 15, 1988, in the vicinity of 1016 4th Street, S.E., the defendant knowingly possessed nineteen packets of cocaine with the specific intent to distribute them. These are precisely the same *facts* which the government would need to prove in the instant case in order to secure a conviction, and no additional facts would need to be proven. Thus, while contempt is itself a general intent offense, the particular contempt of which defendant was convicted included a specific intent element as a necessary component of proving the commission of a criminal offense.

Consequently, it is clear that the present prosecution does not satisfy the *Blockburger* test since conviction of possession with intent to distribute cocaine in this case will not require proof of any fact which was not required to be proven in the earlier contempt trial.

III. DOES ALBERNAZ PROVIDE AN EXCEPTION TO BLOCKBURGER?

As its second argument the government urges that, even if the *Blockburger* test is not satisfied, the instant prosecution is not precluded on grounds of double jeopardy. Rather, the government contends, *Albernaz v. United States,* 450 U.S. 333 (1981), shows that the *Blockburger*

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[6] Defendant does not here argue, and thus the Court need not consider, whether such an order—in effect, an order "to obey the law"—is essentially redundant and cannot give rise to additional punishment beyond that prescribed by the legislature for the particular offense defendant is alleged to have committed.

test is not controlling where there is a clear legislative intent that the two offenses are to be treated as separate offenses. Such a clear legislative intent is present here, the Government urges:

> The objective of the contempt statute, D.C. Code § 11-944, is to preserve the authority of the court and the integrity of the judicial process. To that end the court was given the power to punish Dixon for his willful disregard in violating the conditions of his pretrial release. The objective of the legislature in treating as criminal, the possession of cocaine with intent to distribute, is clearly a different aim, namely to protect society from the immediate and far reaching evils that result from dispersing dangerous drugs in the community.

Government's Opposition to Defendant's Motion to Dismiss the Indictment on Grounds of Double Jeopardy at 3.

Assuming *arguendo* that the legislative objectives in the contempt and possession with intent to distribute statutes are different, does that fact permit multiple prosecutions (or multiple punishments) for offenses which are the same under *Blockburger*? There is some language in the *Albernaz* opinion which might initially be thought to support that proposition. Thus, in his opinion for the Court, Justice (now Chief Justice) Rehnquist declares that "[t]he *Blockburger* test is a 'rule of statutory construction,' and because it serves as a means of discerning congressional purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent." *Albernaz, supra,* 450 U.S. at 340.

This statement, however, must be read in the context of the holding in *Albernaz.* In that case, petitioners were convicted of conspiracy to import marijuana in violation of 21

U.S.C. § 963 and conspiracy to distribute marijuana in violation of 21 U.S.C. § 846. They received consecutive sentences for each offense. They argued on appeal that, since it was unclear whether Congress intended to authorize multiple punishment for violation of these two statutes in a case involving only a single agreement or conspiracy, the rule of lenity barred the imposition of multiple punishment and, alternatively, that such cumulative punishment was barred by the Double Jeopardy Clause.

The Supreme Court held that "[t]he statutory provisions at issue here clearly satisfy the rule announced in *Blockburger*" since " 'each provision requires proof of a fact [that] the other does not.' " 450 U.S. at 339. Moreover, the Court found that there was nothing in the legislative history to suggest that Congress meant to bar multiple punishment for violation of these two statutes, even if *Blockburger* did not. Accordingly, the Supreme Court affirmed the convictions and the consecutive sentences imposed.

Thus, *Albernaz* shows only that, even in a case where the *Blockburger* test *is* satisfied so that multiple punishment or prosecution would not normally be thought to constitute double jeopardy, the Court is willing to consider that such punishment may still be precluded by a clear showing that the legislature did not intend to permit such multiple punishment. The case certainly does not hold that multiple prosecution or punishment of offenses which *fail* the *Blockburger* test is nonetheless permissible if the legislature manifested a clear intention to authorize such multiple punishments. This is made plain by the concurring opinion of Justice Stewart who observes, "[n]o matter how clearly it spoke, Congress could not constitutionally provide for cumulative punishments unless each statutory offense required proof of a fact that the other did not, under the criterion of *Blockburger v. United*

States, 284 U.S. 299." *Albernaz v. United States, supra,* 450 U.S. at 345 (Stewart, J., concurring).

IV. IS THE DOUBLE JEOPARDY CLAUSE APPLICABLE TO CONTEMPT PROCEEDINGS?

The most serious question presented by defendant's motion is whether the Double Jeopardy Clause is applicable at all in cases involving contempt prosecutions. In *Pearce, Brown, Blockburger, Albernaz,* and most other cases construing that clause, the defendant has faced multiple prosecutions or multiple punishments because of alleged commission of two or more ordinary criminal offenses. Are these principles equally applicable where the defendant is charged, on the one hand, with committing a particular criminal offense and, on the other hand, with contempt of court?

A. The Old Rule: Contempt Proceedings Do Not Implicate the Double Jeopardy Clause.

For some time it was thought in this country that the contempt power was so different from the power to prosecute for criminal offenses that the Double Jeopardy Clause was simply not implicated when the same conduct gave rise to both a contempt prosecution and a prosecution for commission of an ordinary crime. The three cases most frequently cited for this proposition are *In Re Chapman,* 166 U.S. 661 (1897); *Merchants' Stock and Grain Co. v. Board of Trade,* 201 F. 29 (8th Cir. 1912); and *O'Malley V. United States,* 128 F.2d 876 (8th Cir. 1942), *rev'd on other grounds sub nom. Pendergast v. United States,* 317 U.S. 412 (1943).

In *Chapman* defendant was prosecuted in the Supreme Court of the District of Columbia for violation of a statute making it a misdemeanor for any person to refuse to answer any pertinent question put to him as a witness before

either House of Congress. Following his conviction, Chapman filed a petition for a writ of habeas corpus, arguing that his incarceration was unlawful on various grounds. One of his arguments was that, since both Houses of Congress had the inherent power to punish by contempt any witness' refusal to testify before them, the statute which also made such conduct a criminal offense constituted an improper delegation of legislative authority and would violate the Double Jeopardy Clause if one were held in contempt and also prosecuted under the criminal statute.

Both the improper delegation and the double jeopardy argument were rejected by the Supreme Court. After concluding that the statute did not involve an improper delegation, Chief Justice Fuller's opinion for the Court declared:

> Nevertheless, although the power to punish for contempt still remains in each House, we must decline to decide that this law is invalid because it provides that contumacy in a witness called to testify in a matter properly under consideration by either House, and deliberately refusing to answer questions pertinent thereto, shall be a misdemeanor against the United States, who are interested that the authority of neither of their departments, nor of any branch thereof, shall be defied and set at naught. It is improbable that in any case cumulative penalties would be imposed, whether by way of punishment merely, or of eliciting the answers desired, but it is quite clear that the contumacious witness is not subjected to jeopardy twice for the same offence, since the same act may be an offence against one jurisdiction and also an offence against another; and indictable statutory offences may be punished as such, while the offenders may likewise be subjected to punishment for the same acts

> as contempts, the two being *diverso intuitu* and capable of standing together.

166 U.S. at 672.

In *Merchants' Stock and Grain, supra,* the Chicago Board of Trade had obtained an injunction precluding the Merchants' Stock and Grain Company and certain individuals from using or distributing the Board's quotations without first lawfully obtaining the right to do so from the Board. Subsequently, the Board moved to hold Merchants' and the individuals in contempt for violating the injunction. The trial court appointed a special examiner to take evidence on the matter and render a report. Upon receipt of the report, the court held defendants in contempt and imposed a fine, part to be paid to the Board of Trade and part to the government.

On appeal defendants raised a number of arguments, particularly that reference to the special examiner violated their Sixth Amendment right to confront the witnesses against them. Acknowledging that the proceeding was for criminal rather than civil contempt, at least as to the portion of the fine paid to the government, the Court of Appeals nonetheless held that the normal constitutional protections afforded by the Fifth and Sixth Amendments were not available to defendants in a criminal contempt proceeding since "criminal contempts are tried summarily, and not in the regular course or way." 201 F. at 26. Thus, the Court indicated, there was no right to jury trial in such contempts, nor a right to seek a change of venue, nor a right to be present at the time of one's sentencing, nor a privilege against self incrimination. In the course of listing the various constitutional protections which were not available in contempt matters, the Court also stated:

> An act which is a contempt of court and also a crime may be punished both by the summary provision and by indictment, and neither will bar the other.

> In other words, the provision protecting him against being twice put in jeopardy does not protect him against being punished for contempt and under indictment for the same act. In view of these facts and others, it is not to be wondered that the Supreme Court has characterized contempt proceedings as sui generis. It will probably appear that there are a number of other cases in which provisions as to criminal cases and criminal prosecutions do not apply to criminal contempts.

201 F. at 27 (citations omitted).

Both of the above quoted passages, while certainly reflective of the predominant attitude toward contempt proceedings, are nevertheless dictum. In *Chapman,* no contempt proceeding was brought and the defendant was confronted with a single prosecution for violation of the misdemeanor statute. In *Merchants',* there was a criminal contempt proceeding, but no prosecution of any other sort was involved. However, in *O'Malley v. United States, supra,* both contempt proceedings and criminal prosecutions over the same conduct were present.

In *O'Malley* defendants carried out an elaborate scheme to obtain money from a District Court trust fund by presenting to the court evidence of fictitious settlements. After the fraud was discovered, the defendants were indicted for conspiracy to defraud the United States and endeavoring to obstruct justice. Before these cases proceeded to trial, the defendants entered an agreement with the United States Attorney to plead guilty to certain tax evasion charges. After a jury was sworn to try the conspiracy matters, the government entered a *nolle prosequi,* apparently because the defendants urged that their tax evasion pleas were part of an agreement under which the conspiracy charges would be dropped.

Subsequently, the District Court held the defendants in criminal contempt for the same conduct. On appeal the defendants challenged these contempt convictions on numerous grounds, including double jeopardy. The Court of Appeals rejected this contention:

> The nolle prosequi having been entered on the demand of the appellants, double jeopardy did not result, even if the indictments were for the same offenses as charged in the instant proceeding. Craig v. United States, 9 Cir., 81 F.2d 816. The charges in the indictments, however, were not the same as those involved in the instant proceeding. . . . Punishments for contempt of court and on conviction under indictment for the same acts are not within the protection of the constitutional inhibition against double jeopardy. Acts of misbehavior, though constituting violation of the criminal law, may also constitute contempt of court if committed in the presence of the court. Merchants' Stock & Grain Co. v. Board of Trade, 8 Cir., 201 F. 20. The plea of double jeopardy can not prevail.

128 F.2d at 684.

O'Malley, as will be noted, does involve multiple prosecutions, one for violation of general criminal statutes and one for criminal contempt. Moreover, the language quoted above appears to assert a broad principle that double jeopardy is not implicated by such multiple prosecutions. However, as the penultimate sentence notes, the contempt involved in *O'Malley* was held to have occurred "in the presence of the court." As will be noted *infra,* that circumstance presents a critical distinction between that case and the one at bar.

B. The Expansion of Defendants' Rights in Criminal Contempt Proceedings.

The assertion that contempt proceedings do not implicate the Double Jeopardy Clause must be placed in the historical context of a steady expansion of defendant's rights in certain kinds of contempt proceedings.

Originally, the Judiciary Act of 1789 codified the broad contempt power that had existed in English common law by establishing the courts and providing, in part, that those courts "shall have power to . . . punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same . . . ." ch. 20, § 17, 1 Stat. 73. However, after federal Judge James Peck used contempt to disbar and imprison a lawyer who wrote an article criticizing some of the judge's opinions, public concern about such abuses of discretion led to the Act of 1831 which limited the contempt power by providing,

> That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts.

ch. 99, § 1, 4 Stat. 487, 487-88. A similar limitation currently exists at 18 U.S.C. § 401 and is implemented by Federal Rule of Criminal Procedure 42.

That rule—and its substantially identical counterpart, Superior Court Rule of Criminal Procedure 42—distinguishes between summary and nonsummary contempt proceedings. Under Rule 42(a), a court may punish "summarily" for contemptuous conduct occurring in its presence. Rule 42(b), governing "nonsummary" contempt proceedings for conduct which occurs outside the court's presence, affords defendants significant due process protections in such proceedings. The rule reflects a judicial recognition of the need to provide greater due process rights to nonsummary contemnors. *See, e.g., Ex parte Terry,* 128 U.S. 289, 311 (1888) (distinguishing between procedures used for contempts that occur in the presence of the courts and contempt that occurs outside that presence).

In this century, a series of Supreme Court decisions have tended to "assimilate criminal contempt to ordinary crimes," *United States v. Rollerson,* 145 U.S. App. D.C. 338, 340, 449 F.2d. 1000, 1002 (1971), and have gradually augmented the list of rights deemed constitutionally applicable to nonsummary contempt proceedings.[7] Thus, by 1968, it was possible for the Supreme Court to accurately observe that "procedures in criminal contempt cases have come to mirror those in ordinary criminal cases." *Bloom v. Illinois,* 391 U.S. 194, 207 (1968). *See generally* Kuhns, *Limiting the Criminal Contempt Power: New Roles for the Prosecutor and the Grand Jury,* 73 Mich. L. Rev. 483,

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[7] *See, e.g., Gompers v. Buck's Stove & Range Co.,* 221 U.S. 418, 444 (1911) (reasonable doubt standard); *Cooke v. United States,* 267 U.S. 517, 537 (1925) (notice, hearing, counsel, attendance of witness); *In re Oliver,* 333 U.S. 257 (1948) (public trial); *Offutt v. United States,* 348 U.S. 11 (1954) (unbiased judge); *Panico v. United States,* 375 U.S. 29 (1963) (insanity defense); *United States v. Barnett,* 376 U.S. 681 (1964) (jury trial); *Harris v. United States,* 382 U.S. 162 (1965) (notice and hearing); *Cheff v. Schnackenberg,* 384 U.S. 373 (1966) (jury trial); *Bloom v. Illinois,* 391 U.S. 194 (1968) (jury trial).

484-93 (1975). Although there have been some decisions prescribing the minimum due process standards which must be observed even in summary contempt cases,[8] the principal evolution in rights has concerned nonsummary proceedings.

C. The Present View: Double Jeopardy Is Still Not Implicated By Summary Contempt Proceedings.

Despite the expansion of defendant's rights with respect to nonsummary contempt, it is still generally held that the Double Jeopardy Clause is not violated if a defendant who has been found in summary contempt for certain conduct occurring in the courtroom is later prosecuted, on the basis of the same conduct, for committing a substantive criminal offense.

One of the leading cases of this kind is *United States v. Mirra*, 220 F.Supp. 361 (S.D.N.Y. 1963). Mirra, while under cross-examination, stood up, took the witness chair on which he had been sitting, and hurled it at the prosecutor. The trial judge summarily held him in contempt of court and sentenced him to imprisonment for one year. Subsequently he was indicted for armed assault on account of the same conduct. In a much cited opinion, District Judge Edelstein held that "a criminal prosecution arising out of and subsequent to summary contempt conviction does not offend the policy underlying the protection against Double Jeopardy." 220 F.Supp. at 366. This is because the defendant in such a situation is not subjected to successive trials, the contempt being imposed summarily and without any elaborate trial proceeding. Moreover, Judge Edelstein observed, the power of summary contempt is needed to assure orderly and dignified judicial proceedings.

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[8] *See generally Kuhns, The Summary Contempt Power: A Critique and a New Perspective*, 88 Yale L.J. 39 (1978).

A similar result was reached in *United States v. Rollerson*, 145 U.S. App. D.C. 338, 449 F.2d 1000 (1971). There defendant was found in summary contempt for throwing a water pitcher at a prosecutor during his trial for robbery. Later he was prosecuted for assault with a dangerous weapon and assault on a federal officer. Relying on the *Mirra* decision and the summary nature of the contempt proceedings under Rule 42(a), the Court of Appeals held that the later prosecution did not violate defendant's double jeopardy rights. Significantly, at the close of its opinion, the Court said "[i]n this case we do not decide whether the Double Jeopardy Clause would bar a criminal prosecution following a separate contempt hearing pursuant to Rule 42(b), Fed.R.Crim.P." 145 U.S. App. D.C. at 343, 449 F.2d at 1005 n. 13.

Similarly, in *People v. Totten*, 118 Ill. 2d 124, 514 N.E.2d 959 (Ill. 1987), the defendant in a criminal case, at sentencing, hit the prosecutor. The judge, seeing this, held him in summary ("direct") contempt and sentenced him to six months in prison. Relying on the summary nature of that proceeding, and citing *Mirra* and *Rollerson*, the Supreme Court of Illinois held that the summary contempt conviction did not pose a double jeopardy impediment to the defendant's later prosecution for aggravated battery concerning the same episode.

In *Marangelo v. Criminal Court*, 49 Misc.2d 414, 267 N.Y.S.2d 791 (N.Y. Sup. Ct. 1966), a summary contempt conviction for refusal to testify before a grand jury was held not to present a double jeopardy obstacle to a subsequent prosecution for conspiracy.

In *Maples v. State*, 565 S.W.2d 202 (Tenn. 1978), defendant was held in summary contempt and fined as a result of admittedly fraudulent divorce proceedings. Subsequently, he was prosecuted for perjury concerning the same acts. His double jeopardy argument against the later

prosecution was rejected by the Supreme Court of Tennessee in an opinion emphasizing the summary nature of the earlier contempt proceeding against him.

Finally, in *State v. Warren,* 186 N.J.Super. 35, 451 A.2d 197 (N.J. Super. Ct. Law Div. 1982), defendants refused to answer questions at murder trials after being ordered to do so. They were held in summary contempt and sentenced to six months. Later they were indicted for hindering a prosecution. Their double jeopardy argument against the subsequent prosecution was rejected on grounds that the initial convictions resulted from summary proceedings and thus they were not threatened with successive trials.

In all of these cases, the two offenses involved in the successive prosecutions failed the *Blockburger* test, *i.e.*, it could not be said that each provision required proof of a fact which the other did not. However, because the conduct in the contempt matter occurred in the courtroom before the eyes of the sentencing judge and no successive trial was involved, principles of double jeopardy were held not to be violated by the subsequent criminal prosecution.

D. The Emerging View that Double Jeopardy Protection Does Apply To Non-Summary Contempt Proceedings.

In contrast to summary contempt cases, double jeopardy considerations are quite different when a defendant is convicted of criminal contempt via a non-summary hearing or trial. In such circumstances the issue of successive trials, which is at the heart of the Double Jeopardy Clause, is directly implicated. Thus, virtually all of the courts that have considered this matter in the last fifteen years have held that double jeopardy principles do preclude successive prosecutions—one for non-summary contempt and the other for violation of ordinary criminal statutes—for the same conduct.

The first intimations of this view were expressed by the Supreme Court in *Colombo v. New York,* 405 U.S. 9 (1972). There defendant refused to answer questions before a grand jury despite a grant of immunity. The trial court ordered him to do so and he refused. After giving the defendant a week to change his mind, the trial court held him in "criminal contempt" and sentenced him to pay a $250 fine and serve thirty days in jail. Later defendant was indicted for contumacious and unlawful refusal to answer legal and proper interrogatories in violation of New York Penal Law Section 600. His double jeopardy argument was rejected by the New York Court of Appeals on grounds that the contempt was really civil in nature and that it concerned one act (refusal to testify before the grand jury) while the indictment concerned another act (refusal to obey the order of the trial judge).

On writ of certiorari, the Supreme Court reversed in a brief *per curiam* opinion. The Court held that the contempt was truly criminal in nature since defendant had been sentenced to a definite term in jail and a fixed fine. It also noted that there was some confusion in the record as to whether the contempt and the indictment concerned the same act. Implying that if they did, double jeopardy would bar the indictment, the Supreme Court remanded to the New York Court of Appeals "to reconsider the validity of the indictment under the Double Jeopardy Clause of the Constitution." 405 U.S. at 11. On remand the New York Court of Appeals determined that the indictment did involve the same offense as the contempt conviction and the indictment was dismissed. *People v. Colombo,* 31 N.Y. 947, 293 N.E.2d 247 (N.Y. 1972).[9] *Accord, Menna v. New York,* 423 U.S. 61 (1975).

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[9] Since the contempt in *Colombo* apparently occurred in the presence of the court, *i.e.*, a refusal to obey an order to testify, and

A very similar result was reached in *People v. Lombardo*, 50 Cal. App. 3d 849, 123 Cal. Rptr. 755 (Cal. Ct. App. 1975), where, despite a grant of immunity, a witness refused to testify at trial and was held in criminal contempt and sentenced to a $500 fine plus five days in jail. Thereafter he was charged with a violation of Section 166 of the Penal Code—willfully and unlawfully refusing to answer material questions after being sworn as a witness and having been granted immunity. His plea of former jeopardy was denied and he was convicted and sentenced to six months and a $500 fine, but given credit for time previously served and the amount of the fine previously paid on the contempt order. Without considering that the original contempt action was apparently a summary one, the California Court of Appeals reversed the conviction on double jeopardy grounds, relying on the Supreme Court opinion in *Colombo*.

Perhaps the first case to squarely apply the Double Jeopardy Clause to non-summary contempt proceedings is *United States v. Gypsum Company*, 404 F.Supp. 619 (D.D.C. 1975). There defendants were tried and convicted of price-fixing following a four month trial in Pittsburgh. Thereafter the government sought to have the same defendants tried for criminal contempt for allegedly violating a 1951 consent decree filed in the District of Columbia. The indictment and the contempt petition were filed on the same day and the substantive allegations in each were virtually identical. Judge Barrington Parker granted the defendants' motion to dismiss the contempt proceeding on double jeopardy grounds. He noted that under *Block-*

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was dealt with essentially summarily, it would appear the the matter might have been exempted from the reach of the Double Jeopardy Clause on these grounds. However, neither the Supreme Court nor the New York Court of Appeals considered this possibility.

burger the offenses involved in the contempt case and the price-fixing case were the same. He dismissed the government's assertion that "contempt proceedings are not subject to the usual rules of double jeopardy" by noting that all of the cases cited by the government involved courtroom incidents wherein assaultive conduct was met with summary contempts, contrasting this with the lengthy second trial which would be imposed on defendants in this case. 404 F.Supp. at 623. He also rejected the government's contention that, since contempt is an offense against the judiciary, while substantive crimes are offenses against a legislative command, these proceedings involved separate jurisdictions. He observed that the "separate jurisdiction theory" had traditionally been applied where prosecutions were sought by both state and federal governments and concluded that this principle was grounded in considerations of federalism not present when the United States government pursued the defendants in two federal courts for both contempt of court and violations of the Sherman Act.[10]

Two years later the Supreme Court of Illinois reached a similar result in *People v. Gray*, 69 Ill. 2d 44, 370 N.E.2d 797 (Ill. 1977), *cert. denied*, 435 U.S. 1013 (1978). Gray was held in criminal contempt, following an emergency hearing, for violating a protective order entered in a divorce proceeding which enjoined him from striking or molesting his wife. The court found that defendant had struck his wife with a gun and then shot her. He was sentenced to six months for this contempt. Subsequently he

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[10] In *Gypsum*, Judge Parker assumed—without considering—that the Double Jeopardy Clause applies to corporate defendants in the same way as to natural persons. This is probably correct. *See United States v. Hospital Monteflores, Inc.*, 575 F.2d 332 (1st Cir. 1978); *United States v. Security National Bank*, 546 F.2d 492 (2nd Cir. 1976), *cert. denied*, 430 U.S. 950 (1977).

was prosecuted and convicted of aggravated battery and attempted murder of his wife based on the same conduct. Citing *Blockburger* and *Brown v. Ohio*, the Illinois Supreme Court concluded that defendant's subsequent prosecution violated his double jeopardy rights. The Court decided that the offenses involved in the two prosecutions were the same because the evidence needed to prove each would be substantially the same.[11]

The next significant opinion in this line is *United States v. Haggerty*, 528 F.Supp. 1286 (D.Colo. 1981), in which air traffic controllers were convicted of criminal contempt for violating a court order that they not engage in a strike. Later they were indicted for violating the provisions of the United States Code which make striking by federal employees a crime. In a lengthy opinion, District Judge Kane reviewed the applicable authorities, including *Blockburger, Colombo, Gypsum, Gray*, and *Rollerson*, and concluded,

> Finally, to my knowledge, every court which has addressed the issue has held that where a court order which forms the basis for a criminal contempt conviction includes a prohibition against committing a substantive offense, successive prosecutions for both criminal contempt and for the substantive offense violate the double jeopardy clause.

528 F.Supp. at 1299.

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[11] In *People v. Totten*, 118 Ill. 2d 124, 514 N.E.2d 959 (Ill. 1987), the Illinois Supreme Court overruled the *Gray* decision to the extent that it used "the same evidence test" to determine whether the two offenses were the same. However, the Court made clear that an "indirect" (i.e., non-summary) contempt conviction would bar a subsequent prosecution concerning the same matter unless, as required by *Blockburger*, each conviction required proof of a fact which the other did not. 118 Ill. 2d at 39, 514 N.E. 2d at 965.

Accordingly, the Court granted the defendants' motion to dismiss the indictment.

Yarbro v. State, 402 So. 2d 599 (Fla. Dist. Ct. App. 1981), involved a defendant found in criminal contempt for perjury during a divorce trial and sentenced to 179 days. Later the defendant was charged by information with perjury for the same statements. Concluding that the offenses in the two cases were the same under *Blockburger*, the Florida Appellate Court determined that the Double Jeopardy Clause precluded the subsequent perjury protection.

In *Commonwealth v. Allen*, 322 Pa. Super. 424, 469 A.2d 1063 (Pa.Super. 1983) *aff'd in part and rev'd in part*, 506 Pa. 500, 486 A.2d 363 (Pa. 1984), *cert. denied*, 474 842 (1985), orders were entered enjoining defendant from physically abusing, striking or harrassing his wife and minor children. Following a hearing, defendant was found in contempt of this order for entering his wife's residence and hitting her. He was fined $750. Later he was indicted for simple assault, trespass and rape in connection with the same conduct. In a thorough opinion discussing *Blockburger, Gray, Gypsum, Haggerty* and other cases, the Court held that the assault prosecution was barred by double jeopardy but that trespass and rape were not since those offenses required proof of facts additional to those which were necessary to secure the contempt conviction. 469 A.2d at 1069.

Finally, *State v. Thompson*, 294 Or. 528, 659 P.2d 383 (Or. 1983), is an *en banc* opinion of the Supreme Court of Oregon authored by Justice Hans Linde, a respected constitutional scholar. Thompson had been convicted and fined for contempt for violating an injunction, entered in a property dispute, prohibiting him from entering upon his neighbor's land. This conviction for indirect contempt was held by the Oregon Supreme Court to bar a subsequent prosecution for criminal trespass concerning the

same conduct. Although the decision is purportedly based on Oregon statutory law concerning double jeopardy, the opinion implies that the Double Jeopardy Clause of the Fifth Amendment would require the same result, since the contempt conviction was not the result of a summary proceeding.

> Recent cases from other jurisdictions are in accord that an indirect criminal contempt proceeding bars on double jeopardy grounds a subsequent criminal prosecution based on the same facts. *See, e.g., United States v. Haggerty,* 528 F.Supp. 1286, 1296-1300 (D.Colo. 1981) (strike against government); *United States v. U.S. Gypsum Co.,* 404 F.Supp. 619, 622-23 (D.D.C. 1975) (price fixing); *Simanonok v. Randle,* 388 So.2d 45 (Fla.App. 1980) (refusal to connect sewer); *People v. Gray, supra* (shooting wife). Courts have permitted a subsequent criminal prosecution only when the criminal contempt conviction was direct and summary. *See, e.g., United States v. Rollerson,* 145 U.S.App.D.C. 338, 449 F.2d 1000 (1971) (assault on federal officer); *O'Malley v. United States,* 128 F.2d 676, 684 (8th Cir. 1942), *rev'd on other grounds* 317 U.S. 412, 63 S.Ct. 268, 87 L.Ed. 368 (1943) (conspiracy to obstruct justice); *United States v. Mirra,* 220 F.Supp. 361 (S.D.N.Y. 1963) (assault on prosecutor); *Maples v. State,* 565 S.W.2d 202 (Tenn. 1978) (perjury).

294 Or. at 532, 659 P.2d at 387 n. 5.

E. Current State of the Law Assessed.

The foregoing review of authorities might suggest a summing up along the following lines: For some time it was thought in this country that contempt proceedings were *sui generis,* or at least quite different from ordinary

criminal prosecutions, and that they did not implicate the protections afforded by the Double Jeopardy Clause. In recent years, however, a number of decisions have made clear that non-summary contempt proceedings—that is, separate trials for conduct which occurred outside the presence of the court—are essentially equivalent to criminal prosecutions and that defendants in such proceedings are thus entitled to the same protections afforded defendants in ordinary criminal cases. Thus, the modern view is that double jeopardy principles do apply to non-summary contempt proceedings but not to summary contempts, since the latter do not pose the dangers of successive trials to which the Double Jeopardy Clause is addressed.

The foregoing description of the law, while neat and clean, has two problems.

First, there are some reported decisions which do not appear to conform to the description. While there is no reason to expect a totally harmonious and consistent pattern of cases on this aspect of constitutional law, which the Supreme Court has yet to settle definitively, it is worth asking whether the discordant cases suggest a need to re-examine the hypothesis. On reflection, this Court thinks that such re-examination is not required, since many of the apparently abberant cases can properly be explained in other ways. Some of the cases which decline to apply double jeopardy principles to contempt matters involve civil, not criminal, contempt.[12] In other cases, the offenses involved in the contempt matter and the criminal prosecution are simply not the same under *Blockburger.*[13] Some

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[12] See, for example, *United States v. Anderson,* 577 F.Supp. 223, 230 (D.Wyo. 1983).

[13] See, for example, *People v. Gardner,* 118 Ill. 2d 124, 514 N.E.2d 959 (Ill. 1987); *United States v. Garcia-Pupo,* 845 F.2d 8 (1st Cir.

of the cases are older ones which preceeded the recent expansion of defendants' rights in non-summary contempt proceedings.[14] Some of the cases are simply unpersuasive since they fail to cite *Blockburger* or any of the leading cases and involve no reasoning whatever.[15]

The second difficulty with the proposed "summing up" is that it is not really accurate to say that summary contempt proceedings do not infringe the concerns embodied in the Double Jeopardy Clause. Although such proceedings do not involve successive trials, they *do* involve multiple punishments if the same conduct gives rise to both a summary contempt sentence and a sentence for committing a substantive criminal offense. Moreover, the double jeopardy problem cannot be avoided by giving a defendant "credit" on one sentence for time served on the other, as some courts have attempted to do. *See, People v. Lombardo, supra*, 50 Cal. App. 3d 849, 123 Cal. Rptr. 755 (Cal. Ct. App. 1975); *Marangelo v. Criminal Court, supra*, 49 Misc. 2d 414, 267 N.Y.S. 2d 791 (N.Y. Sup. Ct. 1966) (citing § 602 of the New York Penal Law). The Supreme Court has made clear that, where double jeopardy applies, the clause precludes a second conviction even if no additional punishment attaches to that conviction since "[t]he separate *conviction* . . . has potential adverse collateral consequences that may not be ignored." *Ball v.*

1988); *People v. Barry*, 153 Cal. App. 2d 193, 314 P.2d 531 (Cal. Dist. Ct. App. 1957), *cert. denied* 355 U.S. 956 (1957); and *In Re Amato*, 204 Misc. 454, 124 N.Y.S.2d 726 (1953).

[14] *Long v. Commonwealth*, 177 Ky. 391, 197 S.W. 843 (Ky. 1917); *Ivy v. State*, 26 Okla. Crim. 184, 223 P. 401 (Okla. Crim. App. 1924); *Dolan v. Commonwealth*, 304 Mass. 325, 23 N.E.2d 904 (Mass. 1939).

[15] *Darrowman v. State*, 214 Tenn. 408, 381 S.W.2d 251 (Tenn. 1964); *Church v. State*, 239 Miss. 1, 111 So.2d 228 (Miss. 1959); *Nicholas v. Commonwealth*, 186 Va. 986, 45 S.E.2d 305 (Va. 1947).

United States, 470 U.S. 856, 865 (1985) (emphasis in original).

The refusal to apply the Double Jeopardy Clause to cases involving summary contempt convictions is sometimes justified on grounds that, when a criminal offense is committed in the courtroom, in the presence of a judge, there is an added degree of infamy not present when the offense occurs in the outside world. Frankly, to this judge, it is hard to see why assault on a prosecutor in court during trial is any more deserving of enhanced punishment than is assault on a priest in a cathedral during mass or assault on a surgeon in a hospital during open heart surgery. In any event, if there is something specially heinous about criminal offenses being committed in courtrooms, that is an argument for modifying the statutory provisions so as to authorize longer sentences when the offenses are commited in court. It is not an argument justifying multiple punishments through both contempt and ordinary criminal sentences.

The other argument sometimes advanced for not applying double jeopardy principles to summary contempts is that of necessity, *i.e.*, courts need the power to immediately terminate conduct which is impeding their proceedings. While the need for such power is undoubted, it does not follow that such power requires an invasion of rights normally secured by the prohibition against double jeopardy. There are, after all, other ways to quell courtroom disturbances than through imposition of a summary contempt conviction. For example, in many instances, the person disturbing court proceedings may be sufficiently chastened and deterred by simply advising him that the court is now ordering him to show cause, at a subsequent, non-summary proceeding, why he should not be held in criminal contempt. If someone in the courtroom is particularly recalcitrant, the court can always invoke its civil

contempt authority and incarcerate the individual until he purges himself by becoming orderly. Finally, in an extreme case, if it is necessary to impose a summary contempt conviction, a court may, of course do so, but, arguably, with the understanding such a conviction would bar the imposition of further punishment through a later criminal punishment for the same conduct.

V. CONCLUSION

Whatever may be the validity of the rule that the Double Jeopardy Clause is not implicated by summary contempt proceedings, this Court is satisfied that the policies underlying that clause, the guiding Supreme Court decisions on that matter, and the growing body of case law[16] discussed above compel the conclusion that double jeopardy principles *are* implicated by criminal contempt convictions resulting from non-summary proceedings and that such a conviction bars a subsequent criminal prosection if both cases involve the same offense under the *Blockburger* test.[17] Accordingly, since, as determined in Section II

[16] It appears that British courts, who are also beneficiaries of the Magna Carta legacy, have reached the same conclusion. *See Double Jeopardy and Committal for Contempt*, 48 *Journal of Criminal Law* 140, 140-142 (May 1984).

[17] A similar conclusion was reached by Judge Beaudin in *United States v. Jackson*, 113 Wash.L.Rep. 2437 (D.C. Super. Ct. 1985). There, Jackson failed to appear for a status hearing in a theft case. When he was brought before the court, there was a brief proceeding during which he was asked why he had not appeared. Finding his answer insufficient, Judge Beaudin held him in contempt for violating the release order that required him to return to court for all further proceedings; Jackson was then sentenced to three days in jail. Subsequently, the government sought to prosecute him for the substantive offense of failure to appear in violation of D.C. Code § 23-1327(a). Although it appears that the contempt conviction may have resulted from a summary proceeding, Judge Beaudin nonetheless dismissed the

supra, the instant prosecution and the prior non-summary contempt trial before Judge Walton involve the same offense under *Blockburger*, this Court holds that the instant prosecution is barred by the Double Jeopardy Clause.

In closing, it is worth making clear what this Court has *not* held in this opinion.

First, the Court is not holding that defendant's double jeopardy rights were violated when Judge Walton determined to modify defendant's release conditions following his rearrest in the drug case. That question was not presented by the instant motion. However, since a bond determination may be based on, *inter alia*, incentives for flight deriving from an increased collection of pending cases, D.C. Code § 23-1321(b), there would appear to be no double jeopardy infringement if defendant's bond were increased in the murder case due to the drug arrest and he were subsequently tried for the drug case itself.

Second, nothing in this opinion suggests that the Double Jeopardy Clause would be violated if a court holds a hearing and finds that a defendant has violated conditions of his release—*e.g.*, reporting to Pretrial Services for drug testing, living at a particular address, staying away from certain witnesses, obeying a curfew, etc.—which do not themselves constitute criminal offenses. This opinion is concerned only with a violation of the release condition which requires defendant to "refrain from committing any criminal offense" and a subsequent prosecution for the exact offense which is alleged to have constituted the contempt.

Third, this Court is not deciding what impact the relative sentences available for the contempt and the underlying criminal offense might have on any double

failure to appear information in a thorough opinion which concluded that the Double Jeopardy Clause does apply to contempt convictions.

jeopardy, or perhaps due process, considerations. In this case, for example, Judge Walton sentenced defendant to six months for his contempt in violating the release order, whereas possession with intent to distribute cocaine while on pretrial release ordinarily carries a maximum sentence of ten years. D.C. Code §§ 23-1328(a)(1) and 33-541(a)(2)(B). However, not all criminal offenses carry sentences greater than the six months allowed by D.C. Code § 23-1329(a) for violating a condition of pretrial release. Thus, for example, different questions might be presented where a trial court found that a defendant had violated the release condition of refraining from criminal conduct by possessing drug paraphernalia and sentenced such a defendant to six months for contempt, although possession of drug paraphernalia is ordinarily punishable by only thirty days. *See* D.C. Code § 33-603(a). Indeed, where defendant is afforded a right to jury trial, criminal contempt can be punished by up to a life sentence. *See In re Neal*, 475 A.2d 390, 393 (D.C. 1984) ("trial judge has broad discretion imposing sentence for criminal contempt"); *Warring v. Huff*, 79 U.S. App. D.C. 302, 303, 122 F.2d 641, 642, *cert. denied*, 314 U.S. 678 (1941) ("the contempt statute sets no maximum, not even an indefinite one such as life; the maximum is the non-arbitrary discretion of the trial judge"). *Cf.* D.C. Code § 16-705. Consequently, in some circumstances, a conviction following a jury trial for contempt consisting of criminal conduct could expose the defendant to a sentence vastly greater than that which the legislature has prescribed for the underlying criminal offense itself.

The Court is aware that its decision may pose some difficult questions regarding the interaction of judges and prosecutors in initiating criminal proceedings. Thus, where a judge issues an order to show cause and seeks to proceed with a nonsummary contempt hearing involving a

matter such as confronted Judge Walton, the United States Attorney may ask the judge to defer that proceeding, since the holding of such a contempt hearing would preclude the defendant from being tried for the underlying offense. In most—but perhaps not all—instances, it would seem appropriate to accomodate that request and give the government a reasonable opportunity to prosecute the substantive offense. Such accommodations do not seem significantly more difficult than those now followed in this Court where probation revocation is sought on grounds of a rearrest. There, the probation judge traditionally awaits the outcome of the new case, and defendant's probation continues without revocation, absent "technical" violations. In cases of a new arrest while on pretrial release, the Court has greater power—it can modify the defendant's bond without awaiting resolution of the rearrest case.

Accordingly, for all the reasons set forth above, this Court holds that the instant prosecution is barred by the Double Jeopardy Clause. Thus, *defendant's Motion to Dismiss is granted, and it is hereby Ordered that the Indictment is dismissed with prejudice.*

Date: September 26, 1988

Curtis E. von Kann

CURTIS E. VON KANN
Judge

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APPENDIX D

DISTRICT OF COLUMBIA
COURT OF APPEALS

CR F-442-88

UNITED STATES, APPELLANT

v.

ALVIN J. DIXON, APPELLEE

CR F-8415-88

MICHAEL FOSTER, APPELLANT

v.

UNITED STATES, APPELLEE

[FILED OCT. 31, 1991]

On Appeal from the Superior Court of
the District of Columbia
Criminal Division

On Rehearing En Banc

BEFORE: Rogers, Chief Judge, Ferren, Terry, Steadman and Schwelb, Associate Judges, and Newman* and Belson,** Senior Judges.

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* Judge Newman was an Associate Judge of the court at the time of argument. His status changed to Senior Judge on March 11, 1991.

** Judge Belson was an Associate Judge of the court at the time of argument. His status changed to Senior Judge on July 24, 1991.

JUDGMENT

This cause came on to be heard on the transcript of record, the briefs filed, and was argued by counsel. On consideration whereof, and for the reasons set forth in the opinion filed this date, it is now hereby

ORDERED and ADJUDGED by this court that the judgment as to Dixon (#88-1375) is affirmed and the judgment as to Foster (#89-449) is reversed.

For the Court:

/s/ Richard B. Hoffman
RICHARD B. HOFFMAN
Clerk

Opinion per Associate Judge John A. Terry.
Dated: October 31, 1991.

U.S. GOVERNMENT PRINTING OFFICE: 1991—312-324/45274